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Second report on *jus cogens* by Dire Tladi, Special Rapporteur*

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I. Introduction

1. During its sixty-sixth session (2014), the International Law Commission decided to place the topic "*Jus cogens*" on its long-term programme of work.[1] The General Assembly, during its sixty-ninth session, took note of the inclusion of the topic on the Commission's long-term programme of work.[2] At its sixty-seventh session (2015), the Commission decided to place the topic on its current programme of work and to appoint a Special Rapporteur. At its 70th session, the General Assembly took note of the decision of the Commission to place the topic on its agenda and to appoint a Special Rapporteur.[3]

2. At its sixty-eighth session, the Commission considered the first report of the Special Rapporteur and decided to refer two draft conclusions to the Drafting Committee.[4]

3. The first report of the Special Rapporteur addressed conceptual issues. In the first report, the Special Rapporteur proposed that the second report would consider the criteria for *jus cogens*. This proposal was generally supported by the Commission. The purpose of the present report is to consider the criteria for *jus cogens*. Since the Commission has proceeded to base its consideration of the topic on the Vienna Convention on the Law of Treaties of 1969 (hereinafter the "Vienna Convention"), the report will take the Convention as a point of departure in developing the criteria.

II. Previous consideration of the topic

A. Debate in the Commission

4. In the first report, the Special Rapporteur proposed three draft conclusions. Draft conclusion 1 set out the general scope of the topic.[5] Draft conclusion 2 stated that *jus cogens* is an exception to the general rule that international law rules are *jus*

[1] See the report of the International Law Commission on the work of its sixty-sixth session, *Official Records of the General Assembly, Sixty-ninth session, Supplement No. 10* (A/69/10), para. 268 and annex.

[2] See General Assembly resolution 69/118 of 10 December 2014, para. 8.

[3] See General Assembly resolution 70/236 of 23 December 2015.

[4] See first report of the Special Rapporteur on jus cogens (A/CN.4/693). On the decision to refer two draft conclusions to the Drafting Committee, see *Official Records of the General Assembly, Seventy-first session, Supplement No. 10* (A/71/10), para. 100.

[5] Draft conclusion 1, as proposed by the Special Rapporteur (see A/CN.4/693, para. 74), provided as follows: "The present draft conclusions concern the way in which *jus cogens* rules are to be identified, and the legal consequences flowing from them." The Drafting Committee adopted the following draft conclusion: "The present draft conclusions concern the identification and legal effects of peremptory norms of general international law (*jus cogens*)." See statement of the Chairman of the Drafting Committee, *Jus cogens*, 9 August 2016 (http://legal.un.org/ilc/documentation/english/statements/2016_dc_chairman_statement_jc.pdf).

dispositivum.[6] Draft conclusion 3 laid out the general characteristics of *jus cogens*.[7] The first report also raised a number of methodological questions, including whether the Commission should, as part of the consideration of the topic, provide an illustrative list of norms that qualify as *jus cogens*. The report further traced the historical and theoretical foundations of *jus cogens*.

5. The report was generally well-received by members of the Commission. Some members, however, criticized particular conclusions and the methods by which they were arrived at. It is unnecessary to summarize all aspects of the debate, which is well covered in the report of the Commission.[8] Some issues that were raised in the debate, however, will have an impact on the future work of the Commission on the topic. It is these issues that are briefly discussed in section II.C below. The first of these issues concerns the name of the topic. Several members pointed out that the name "*jus cogens*" did not quite capture the essence of the topic.[9] It was pointed out that there were *jus cogens* norms in domestic law which fell outside the scope of the topic. Referring to the topic as *jus cogens* might create the impression that the Commission was also considering those norms. Some members suggested that it would be best to use the name used in the Vienna Convention, that is, "Peremptory norms of general international law (*jus cogens*)".[10] While other members had suggested "Peremptory norms (*jus cogens*) of general international law", there was a preponderance of support for "Peremptory norms of general international law (*jus cogens*)". Although some members questioned whether the topic, as currently formulated, covered areas beyond treaties, most members accepted that the topic did (and should) cover areas of international law relevant to *jus cogens* beyond treaty law.

6. The debate on the first report focused on the draft conclusions prepared by the Special Rapporteur. There was general support for draft conclusion 1, although some members suggested that the draft conclusion should make express the intention to cover the law of State responsibility. Draft conclusion 2 was almost universally criticized, with only a few members of the Commission expressing

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[6] Draft conclusion 2, as proposed by the Special Rapporteur (see A/CN.4/693, para. 74), provided as follows:

"1. Rules of international law may be modified, derogated from or abrogated by agreement of States to which the rule is applicable unless such modification, derogation or abrogation is prohibited by the rule in question (*jus dispositivum*). The modification, derogation and abrogation can take place through treaty, customary international law or other agreement.

"2. An exception to the rule set forth in paragraph 1 is peremptory norms of general international law, which may only be modified, derogated from or abrogated by rules having the same character".

[7] Draft conclusion 3, as proposed by the Special Rapporteur (see A/CN.4/693, para. 74), provided as follows:

"1. Peremptory norms of international law (*jus cogens*) are those norms of general international accepted and recognized by the international community of States as a whole as those from which no modification, derogation or abrogation is permitted.

"2. Norms of *jus cogens* protect the fundamental values of the international community, are hierarchically superior to other norms of international law and are universally applicable".

[8] See A/71/10, paras. 112-129.

[9] See, for example, A/CN.4/SR.3317, statement by Mr. Candioti.

[10] Ibid.

support for it.[11] The Special Rapporteur, in the face of the criticism, decided to withdraw the proposal for draft conclusion 2, on the understanding that paragraph 2 of draft conclusion 2 would be incorporated into the definitional aspects of draft conclusion 3.

7. It was draft conclusion 3 that attracted the widest divergence of views. While there were some proposals for the redrafting of paragraph 1 of draft conclusion 3, its content was not the subject of any serious disagreements. Paragraph 2, however, raised a heated debate. Most members of the Commission who spoke on the topic supported the contents of the paragraph.[12] A few members rejected its content, suggesting that international law did not recognize that *jus cogens* norms "protect the fundamental values of the international community, are hierarchically superior to other norms of international law and are universally applicable".[13] A handful of members expressed agreement with the content of paragraph 2 but suggested that the first report did not provide sufficient basis for the core characteristics identified therein.

8. A final issue that received significant attention from the Commission concerned the question whether the Commission should provide an illustrative list as part of its consideration of the topic. The views in the Commission were evenly split, with some members suggesting that the Commission should provide an illustrative list as originally planned in the syllabus, while others suggested that the illustrative list should not be provided.[14] The Special Rapporteur will consider these views, together with the views expressed by States, and provide a recommendation to the Commission in due course.

9. On the basis of its debate, the Commission decided to refer draft conclusions 1 and 3 to the Drafting Committee.

B. Debate in the Sixth Committee

10. Many delegations welcomed the inclusion of the topic in the Commission's programme of work. Delegations also generally welcomed the Commission's consideration of the topic as well as the Special Rapporteur's first report. A handful of delegations continued to express reservations about the Commission's decision to embark upon the consideration of the topic. France was particularly critical of the Special Rapporteur's approach, suggesting that it did not give due consideration to the practices and opinions of States and, instead, adopted "an overly theoretical or ideological approach" to *jus cogens*.[15] Still on the question of the practice and opinions of States, France contended in its statement that the Special Rapporteur,

[11] See A/71/10, para. 124. For support of the content of draft conclusion 2, see A/CN.4/SR.3314, statement of Mr. Caflisch.

[12] For a summary of the debate on draft conclusion 3, see A/71/10, paras. 125-127.

[13] Ibid.

[14] See A/71/10, paras. 116-118.

[15] A/C.6/71/SR.20, para. 77.

"despite [France's] well-known reservations ... concludes that France is not a persistent objector".[16]

11. The idea of referring to the topic as "peremptory norms of international law (*jus cogens*)" received support from at least one delegation, while no delegation objected to it.[17] With respect to the scope of the topic, different delegations expressed differing views. Some delegations expressed the view that the Commission should limit its consideration of the subject of *jus cogens* to treaty law.[18] Most delegations that commented on the question, however, adopted the view that the topic should be broad and cover areas beyond treaty law.[19]

12. Some delegations expressed concern about the existence and availability of practice. The United States of America, for example, expressed the concern that, from a methodological point of view, only limited international practice existed, which might make it difficult to draw valid conclusions.[20] The Netherlands was more direct, stating that the clear majority of sources cited by the Special Rapporteur in his first report would qualify as "doctrine".[21] The Netherlands went on to state that the first report did not clarify how, in practice, States dealt with the notion of *jus cogens*, cautioning that, whatever the outcome of the Commission's work, it should take into account, and be based upon, State practice.[22]

13. As was the case in the Commission, the debate in the Sixth Committee focused on the draft conclusions. In general, delegations expressed support for the draft conclusions, although draft conclusion 2 did attract some words of caution and criticism.[23] Similarly, as was the case with the debate in the Commission, views on the second paragraph of draft conclusion 3 differed. It will be recalled that the second paragraph of draft conclusion 3 identified three characteristic elements of *jus cogens*, namely that they are hierarchically superior to other norms, are universally

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[16] See written statement of France (on file with the Special Rapporteur): "In his report, Mr. Tladi is particularly interested in the French position. Despite my country's well-known reservations with regard to the concept of *jus cogens*, he concludes that France is not a persistent objector ... and that France has accepted it in principle. He does not, however, take into account the reservations expressed about this concept by the French delegations, *especially in recent years*." (emphasis added).

[17] See statement of Austria, *Official Records of the General Assembly, Seventy-first session, Sixth Committee, 25th meeting* (A/C.6/71/SR.25), para. 87. ("It would be preferable to use the expression 'peremptory norms of international law (*jus cogens*)'"). Although Austria was concerned with the wording of draft conclusion 3, paragraph 1, it did support the idea that the proper reference should be "peremptory norms of international law (*jus cogens*)".

[18] See statement of France (A/C.6/71/SR.20, para. 77).

[19] See, for example, the statements of Cyprus (A/C.6/71/SR.22, para. 55), Greece (A/C.6/71/SR.25, para. 39), the Republic of Korea (A/C.6/71/SR.24, para. 86), Portugal (on file with the Special Rapporteur) and the Russian Federation (A/C.6/71/SR.25, para. 67).

[20] Statement of the United States, A/C.6/71/SR.26, para. 125.

[21] Statement of the Netherlands, A/C.6/71/SR.26, para. 43.

[22] Ibid.

[23] Greece was critical of the draft conclusion (see A/C.6/71/SR.25, para. 41). The following States, while not expressing criticism of the content, adopted a cautious approach: Romania (A/C.6/71/SR.26), Spain (A/C.6/71/SR.26, para. 12: "Spain was not entirely convinced that draft conclusion 2 should allude to *jus dispositivum* norms ... in international law") and Malaysia (A/C.6/71/SR. 26). Austria expressed support for the content of draft conclusion 2, noting that it agreed with the proposal to distinguish between *jus dispositivum* and *jus cogens* (A/C.6/71/SR.25, para. 87).

applicable and reflect the values of the international community. Some States rejected those elements.[24] Other States, however, supported these characteristic elements.[25] There were still other States that commented on only some of the elements of the draft conclusion.[26]

14. While it is clear that, of those States that expressed a view on paragraph 2 of draft conclusion 3, the majority supported its contents, it is useful to focus on the criticism expressed against the elements of paragraph 2. For China, the problem with the elements was that they were "obviously at variance with the basic elements of *jus cogens* set out in article 53 of the Vienna Convention".[27] The elements in the second paragraph were seen as adding new core elements or requirements.[28] With respect to hierarchical superiority, China questioned whether this "new" element would imply that *jus cogens* should prevail over the Charter of the United Nations, given that Article 103 of the Charter provides that obligations under the Charter prevail over other obligations.[29] The United States, on the other hand, feared that the elements of paragraph 2, in particular the notion that *jus cogens* norms are universally applicable and reflect the fundamental values of the international community, would open the door to attempts to derive *jus cogens* norms from vague and contestable natural law principles, without regard to their actual acceptance and recognition by States.[30]

15. There is one final point that arose in the debate in the Sixth Committee that needs to be mentioned. The delegation of Turkey took issue with the first report's

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[24] States that opposed the elements in paragraph 2 of draft conclusion 3 were China (A/C.6/71/SR.24, para. 89, noting that the elements were at variance with article 53 of the Vienna Convention) and the United States (A/C.6/71/SR.26, para. 126).

[25] States that supported the elements in paragraph 2 of draft conclusion 3 are Brazil (A/C.6/71/SR.26, para. 91); Czechia (A/C.6/71/SR.24, para. 72: "*Jus Cogens* norms were exceptions to other rules of international law. They protected the fundamental values of the international community and were universally applicable."); El Salvador (A/C.6/71/25, para. 62); Slovenia (statement on file with the Special Rapporteur: "notes the thorough consideration of the characteristics that are inherent in a *jus cogens* rule, and wishes to underline that it agrees with the enunciation of *jus cogens* as having special and exceptional character, reflecting the common and overarching values ... [and requiring] universal adherence"); and South Africa (A/C.6/71/SR.26, para. 87: "[South Africa] was disappointed that the Commission had not been able to agree on what South Africa believed were basic and uncontroversial characteristics. It was generally accepted that jus cogens norms were universally binding, reflected fundamental values and interests and were hierarchically superior.").

[26] Cyprus expressed support for the element of "hierarchical superiority" (A/C.6/71/SR.22, para. 56), while Spain expressed doubt concerning the notion of hierarchical superiority (A/C.6/71/SR.26, para. 12). Iceland, on behalf of the Nordic countries, questioned the necessity of referring to "the values of the international community" (A/C.6/71/SR.24, para. 63), while Slovakia supported the notion that *jus cogens* reflected "fundamental values of the international community" (A/C.6/71/SR.26, para. 147). The Islamic Republic of Iran expressed support for the notion that *jus cogens* norms were universally applicable (A/C.6/71/SR.26, para. 122).

[27] A/C.6/71/SR.24, para. 89.

[28] Ibid.

[29] Ibid., para. 90.

[30] A/C.6/71/SR.26, para. 126.

use of the Treaty of Guarantee[31] and the reliance on it by some States as an example of the application of *jus cogens*.[32] This concern provides the Special Rapporteur an opportunity to clarify that all the examples given in the first and second reports, as well as in any future report, are given only as examples of practice without prejudice to the quality of the practice or correctness of the views implied by the practice in question. The Commission cannot, however, be prevented from relying on practice because that particular practice is disputed by States.

C. Issues arising from the debates

16. It is perhaps useful to begin with the observations concerning the need to rely on practice. The view of the Special Rapporteur is reflected in the first report. In that report the Special Rapporteur stated that "the Commission approaches its topics by conducting a thorough analysis of State practice in all its forms, judicial practice, literature and any other relevant material".[33] Indeed this view was emphasized during the debate in the Sixth Committee.[34] It is the Special Rapporteur's considered view that the approach adopted in the first and current reports has remained true to this approach.

17. While, as suggested in the statement by the Netherlands,[35] there is more "doctrine" than practice, it is equally true that there is no single conclusion proposed in the first report or the present report that is not based on practice. In the summary of the Commission's debate, the Special Rapporteur noted (with examples) that many texts on other topics of the Commission have been adopted on significantly less practice than what is provided in support of the contents of paragraph 2 of draft conclusion 3.[36] This practice has been accurately analysed and assessed. It is true, as France noted, that the practice of France was of particular interest to the Special Rapporteur. This was because France was known as having objected to the very idea of *jus cogens*. Yet actual practice, as seen from the statements of France itself, shows this to be inaccurate. The assessment was not concerned with whether France is or is not a persistent objector and nowhere does the first report draw any conclusions in this respect. All that the report states, with regard to France, is the well-documented fact that, at the adoption of the Vienna Convention, France did not object to the idea of *jus cogens*. Rather, France

[31] See A/CN.4/693, para. 39 ("In 1964, for example, Cyprus contested, on the basis of the notion of peremptory norms, the validity of the Treaty of Guarantee between Cyprus, the United Kingdom, Greece and Turkey of 1960"). For the text of the Treaty of Guarantee, see United Nations, *Treaty Series*, vol. 382, No. 5475.

[32] Statement by Turkey, A/C.6/71/SR.29, para. 68.

[33] A/CN.4/693, para. 14. See also para. 45 ("What is important for the purposes of the Commission's work is whether *jus cogens* finds support in the practice of States and jurisprudence of international and national courts — the currency of the Commission's work. While the views expressed in literature help to make sense of the practice and may provide a framework for its systematization, it is State and judicial practice that should guide us.").

[34] See the statement by Czechia (A/C.6/71/SR.24, para. 72: The work of the Commission on the topic "should be based on both State and judicial practice, and supplemented by scholarly writing".) See also the statement by Ireland (A/C.6/71/SR.27, para. 18).

[35] See A/C.6/71/SR.26, para. 43.

[36] See A/CN.4/SR.3323, statement of the Special Rapporteur summarizing the debate.

expressed concern about the lack of clarity concerning how it would be applied and the possibility for its abuse.

18. With respect to the second paragraph of draft conclusion 3, it is important to recall that, contrary to the statement of the United Kingdom, the paragraph was in fact referred to the Drafting Committee by the Commission, and that the text enjoyed a large measure of support both within the Commission and during the debate in the Sixth Committee. With regard to the substance, it is useful to begin by addressing the concern raised by the United States. As stated in the first report, the Special Rapporteur does not intend to resolve the natural law versus positive law debate or adopt one approach over the other. The elements in paragraph 2 of draft conclusion 3 should not be seen as an attempt to surreptitiously insert a natural law approach into the work of the Commission. As the present report will illustrate, the criteria for the determination of whether a norm has reached the status of *jus cogens* remains those in article 53 of the Vienna Convention. Similarly, in response to China's concerns, such elements should not be seen as additional elements. Rather, they should be seen as descriptive and characteristic elements, as opposed to constituent elements (or criteria) of norms of *jus cogens*.[37] Such characteristics may, however, be relevant in assessing the criteria for *jus cogens* norms of international law.

19. It is worth recalling, in considering the elements in the second paragraph of draft conclusion 3, that all delegations that spoke, and the vast majority of the members of the Commission who spoke, took the view that the topic should be based on practice.[38] These elements are ubiquitous in practice, both in the form of State practice and judicial practice, and, as the delegation of South Africa mentioned during the debate in the Sixth Committee, they are "basic and uncontroversial" and "generally accepted". In the view of the Special Rapporteur, the first report already provided sufficient practice to form the basis of the elements.[39] Nonetheless, in the light of suggestions by a few members of the Commission[40] that there was insufficient practice, the Special Rapporteur provided additional materials in his summary of the debate. Since the additional materials are not reflected in the first report, the current report provides a brief summary of the materials, even though the draft conclusions have already been referred to the Drafting Committee.

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[37] See A/CN.4/693, para. 72: "While these are core characteristics ... of *jus cogens*, they do not tell us how *jus cogens* norms are to be identified in contemporary international law."

[38] The only member of the Commission who suggested that the Commission should base its work on doctrine was Mr. Valencia-Ospina (see A/CN.4/SR.3323).

[39] See A/CN.4/693, paras. 61-72.

[40] Mr. Wood (A/CN.4/SR.3314), Mr. Forteau (A/CN.4/SR.3317), Mr. McRae (A/CN.4/SR.3315), Mr. Valencia-Ospina (A/CN.4/SR.3323), Mr. Hmoud (A/CN.4/SR.3322) and Mr. Murphy (A/CN.4/SR.3316).

1. Fundamental values

20. In addition to numerous statements by States,[41] the judgments of the International Court of Justice in *Bosnia and Herzegovina v. Serbia and Montenegro*[42] and *Croatia v. Serbia*[43] and its advisory opinion on *Reservations to the Genocide Convention*,[44] the International Tribunal for the Former Yugoslavia in *Furundžija*,[45] and the Inter-American Commission on Human Rights decision in *Michael Domingues*,[46] there have been countless separate and dissenting opinions and scholarly writings in support of the idea that *jus cogens* norms protect the fundamental values of the international community. These authorities, on their own, ought to be a sufficient basis for the element that the norms of *jus cogens* protect the fundamental values of international law.[47]

21. In his summary of the debate, the Special Rapporteur presented many more authorities. In *Siderman de Blake v. the Republic of Argentina*, the United States Court of Appeals for the Ninth Circuit stated that *jus cogens* norms are "derived

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[41] See, for example, the statements by Germany (A/C.6/55/SR.14, para. 56: "His Government reiterated its conviction regarding the need to define more clearly peremptory norms of international law that protected fundamental humanitarian values"); Italy (A/C.6/56/SR.13, para. 15: "The Vienna Convention on the Law of Treaties contained a tautological definition of peremptory law, which doctrine and jurisprudence had endeavoured to interpret as being a framework of rules prohibiting conduct judged intolerable because of the threat it posed to the survival of States and peoples and to basic human values."); Mexico (A/C.6/56/SR.14, para. 13: "The very concept of peremptory norms had been developed to safeguard the most precious legal values of the community of States"); and Portugal (A/C.6/56/SR.14, para. 66: "Concepts of *jus cogens*, obligations *erga omnes* and international crimes of State or serious breaches of obligations under peremptory norms of general international law were based on a common belief in certain fundamental values of international law").

[42] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43.

[43] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 412; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, judgment of 3 February 2015.

[44] *Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951*, p. 15, at p. 23.

[45] *Prosecutor v. Furundžija*, Judgement, Case No. IT-95-17/1-T, T.Ch., 10 December 1998, paras. 153 and 154, where the Tribunal expressly linked the status of the prohibition of torture as a *jus cogens* norm to the "importance of the values it protects", noting that "[c]learly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community". This was quoted with approval by the European Court of Human Rights in *Al-Adsani v. United Kingdom* (Application No. 35763/97), judgement of 21 November 2001, para. 30.

[46] *Michael Domingues v. United States*, Case No. 12.285 (2002), Inter-American Commission on Human Rights, Report No. 62/02, para. 49.

[47] During the summary of the debate, the Special Rapporteur made the following observations concerning the adequacy of these authorities: "[By comparison], the Commission has approved the persistent objector requirement essentially on the strength of two *obiter dicta* in the *Fisheries* and *Asylum* cases, far less than what was referred to in the present instance." (A/CN.4/SR.3323, p. 14).

from values taken to be fundamental by the international community".[48] Similarly, the United States District Court for the Eastern District of New York observed that it equated *jus cogens* with norms of "the highest standing in international legal norms".[49] These same or similar sentiments have also been expressed by courts in other jurisdictions.[50] The Constitutional Tribunal of Peru has, for example, referred to the "extraordinary importance of the values underlying" *jus cogens* obligations.[51] The Supreme Court of the Philippines, for its part, in defining *jus cogens*, noted that the relevant norms had been "deemed ... fundamental to the existence of a just international order".[52] In the *Arancibia Clavel* case, the Supreme Court of Argentina stated that the purpose of *jus cogens* was to "protect States from agreements concluded against some values and general interests of the international community of States as a whole".[53] The South African Constitutional Court similarly noted that norms of *jus cogens* "reflect the most fundamental values of the international community".[54]

22. It is clear from the above that *jus cogens* norms reflect and protect fundamental values of the international community. This notion has never been seriously questioned. Kolb, for example, a commentator critical of the notion, has stated that it "is the absolutely predominant theory" today.[55] Of course, different

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[48] *Siderman de Blake v. Republic of Argentina*, United States Court of Appeals for the Ninth Circuit, 965 F.2d 699; 1992 U.S. App., p. 715. This decision was cited with approval by several other United States cases as follows: *Estate of Hernandez-Rojas v. United States* 2013 US District Lexis 136922 (SD Cal. 2013), p. 14; *Estate of Hernandez-Rojas v. United States* 2014 US District Lexis 101385 (SD Cal. 2014), p. 9; *Doe I v. Reddy* 2003 US District Lexis 26120 (ND Cal 2003); opinion of Judge McKeown in *Alvarez-Machain v. United States* 331 F.3d 604 (9th Cir. 2003), p. 613. See also dissenting opinion of Judge Pregerson in *Sarei v. Rio Tinto PLC* 671 F.3d 736 (9th Cir. 2010), p. 778 ("*jus cogens* norms represent fundamental components of the ordered international community").

[49] *Nguyen Thang Loi v. Dow Chemical Company (In Agent Orange Product Liability Litigation)* 373 F. Supp. 2d (EDNY, 2005), p. 136.

[50] See, for example, *R (Al Rawi and Others) v. Secretary of State for Foreign and Commonwealth Affairs and Another* [2006] EWCA Civ 1279, para. 101. The Canadian Supreme Court referred to *jus cogens* norms as those norms that "are vital or fundamental to our societal notion of justice ...", *Kazemi Estate v. Islamic Republic of Iran [2014] Supreme Court of Canada 62*, 3 SCR 176, para. 151. The Plenary Session of the Supreme Court of the Russian Federation has similarly described *jus cogens* norms as "basic imperative norms of international law" (*On the Application of Universal Recognised Principles and Norms of International Law and of International Treaties of the Russian Federation by Courts of General Jurisdiction*, decision of the Plenary Session of the Supreme Court of the Russian Federation, No. 5 (10 October 2003) as amended on 5 March 2013).

[51] EXP. No. 0024-2010-PI/TC, Sentencia del Pleno Jurisdiccional del Tribunal Constitucional del Perú, 21 March 2011, para. 53 ("de la extraordinaria importancia de los valores que subyacen a tal [jus cogens] obligación").

[52] *Bayan Muna as represented by Representative Satur Ocampo et al v. Alberto Romulo, in his capacity as Executive Secretary et al, Supreme Court of the Republic of the Philippines (2011).*

[53] *Arancibia Clavel, Enrique Lautaro s/ Homicidio Calificado y Asociación Ilícita y Otros*, Causa No. 259, judgement of 24 August 2004 ("es proteger a los Estados de acuerdos concluidos en contra de algunos valores e intereses generales de la comunidad internacional de Estados en su conjuto").

[54] Constitutional Court of South Africa, *Kaunda and Others v. President of the Republic of South Africa* 2005 (4) SA 235 (CC), p. 169, quoting with approval the first report on diplomatic protection by John Dugard, Special Rapporteur (A/CN.4/506).

[55] Robert Kolb, *Peremptory International Law: Jus Cogens — A General Inventory* (Oxford and Portland, Hart Publishing, 2015), p. 32.

authorities use different words to describe the central notion but the notion itself is generally accepted in international law. For example, some authorities state that *jus cogens* norms "protect" the fundamental values, while others state that these norms "reflect" the fundamental values. Furthermore, some speak of the "fundamental values" while other speak of the "fundamental interests". The general theme, however, is the same.

2. Hierarchical superiority

23. As with the idea that *jus cogens* reflects fundamental values, the view that *jus cogens* norms are hierarchically superior to other rules and norms of international law is generally accepted.[56] Indeed, the Commission has already concluded that *jus cogens* norms are hierarchically superior to other rules,[57] and that conclusion ought to be a sufficient basis to include hierarchical superiority as a characteristic element of *jus cogens*.

24. The first report already provided, in addition to the previous work of the Commission, statements by States,[58] judicial decisions[59] and scholarly writings[60] in support of hierarchical superiority. It is worth pausing here to mention that the Commission has, in the past, adopted text on significantly less practice. Nonetheless, in the aftermath of the debate, the Special Rapporteur produced further authorities in support of what can only be described as an obvious characteristic element of *jus cogens*.

25. Famously, in *Kadi v. Council and Commission*, the Court of First Instance of the Court of Justice of the European Union described *jus cogens* as a "body of

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[56] See Maarten den Heijer and Harmen van der Wilt, "*Jus Cogens* and the humanization and fragmentation of international law", in *Netherlands Yearbook of International Law: Jus Cogens — Quo Vadis?*, vol. 46 (T.M.C. Asser Press, 2016).

[57] See the conclusions of the work of the Study Group on fragmentation of international law, *Yearbook of the International Law Commission, 2006*, vol. II, Part Two (United Nations publication, Sales No. 12.V.13 (Part 2)), chap. XII, sect. D.2, paras. (33) and (34).

[58] See the statements by the Netherlands (A/C.6/68/SR.25, para. 101:"*Jus cogens* was hierarchically superior within the international law system, irrespective of whether it took the form of written law or customary law") and the United Kingdom (*Official Records of the United Nations Conference on the Law Treaties, First Session, Vienna, 26 March-24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), *53rd meeting*, para. 53: "in a properly organized international society there was a need for rules of international law that were of a higher order than the rules of a merely dispositive nature from which States could contract out").

[59] See, for example, *Prosecutor v. Furundžija* (note 45 above), para. 153 (a feature of the prohibition of torture "relates to the hierarchy of rules in the international normative order … this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules").

[60] See, for example, Gennady Danilenko, "International *jus cogens*: issues of law-making", in *European Journal of International Law*, vol. 2, No. 1 (1991); William Conklin, "The peremptory norms of the international community", in *European Journal of International Law*, vol. 23, No. 3 (Oxford University Press, 2012), p. 838 ("the very possibility of a peremptory norm once again suggests a hierarchy of international law norms with peremptory norms being the 'fundamental standards of the international community' at the pinnacle"); see also Marjorie Whiteman "*Jus cogens* in international law, with a projected list", in *Georgia Journal of International and Comparative Law*, vol. 7, No. 2 (1977), p. 609; Mark Janis "The nature of *jus cogens*", in *Connecticut Journal of International Law*, vol. 3, No. 2 (1988), p. 360.

higher rules of public international law".[61] The European Court of Human Rights has similarly described *jus cogens* as "a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules".[62] In *Michael Domingues*, the Inter-American Commission stated that *jus cogens* norms are derived from "superior legal order norms".[63]

26. That the hierarchical superiority of *jus cogens* is beyond question was recognized by Judge Pregerson of the United States Court of Appeals in a dissenting opinion in *Sarei v. Rio Tinto*.[64] It bears mentioning that, while this was in a dissent, the majority in *Siderman de Blake* recognized that *jus cogens* norms were "deserving of the highest status in international law".[65] In *Mann v. Republic of Equatorial Guinea*, the Supreme Court of Zimbabwe described *jus cogens* as those norms "endowed with primacy in the hierarchy of rules that constitute the international normative order".[66] *Jus cogens* has also been described as holding "the highest hierarchical position amongst all other customary norms and principles",[67] as being "not only above treaty law, but over all sources of law",[68] as taking "precedence over other rules of international law",[69] and as norms which "prevail

[61] *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities* [2005] ECR II-3649 (21 September 2005), para. 226.

[62] *Al-Adsani* (note 45 above), para. 60, quoting the International Tribunal for the Former Yugoslavia in *Furundžija* (note 45 above). See also paragraph 1 of the joint dissenting opinion of Judges Rozakis and Caflisch in the *Al-Adsani* case ("The majority recognise that [*jus cogens* norms are] hierarchically higher than any other rule of international law"). See also the concurring opinion of Judges Pinto de Albuquerque, Hajiyev, Pejchal and Dedov in *Al-Dumini and Montana Management Inc v. Switzerland* [2016] ECHR 576 (21 June 2016), para. 34.

[63] *Michael Domingues v. United States* (note 46 above), para. 49. See *Hassan v. Council of the European Union and Commission of the European Communities, Judgment of the Court of First Instance*, judgment of 12 July 2006, para. 92.

[64] *Sarei v. Rio Tinto* (note 48 above), p. 19395.

[65] *Siderman de Blake* (note 48 above), p. 717.

[66] See *Mann v. Republic of Equatorial Guinea* [2008] ZWHHC 1, judgment of 23 January 2008. See also *Nguyen Thang Loi* (note 49 above), at 136, describing *jus cogens* norms as of "the highest standing in international legal norms".

[67] *Bayan Muna* (note 52 above). See also *Certain Employees of Sidhu and Sons Nursery Ltd.* [2012] BCLRB No. B28/2012, para. 44, where the British Columbia Labour Relations Board (Canada), citing *Furundžija* (note 45 above), identified *jus cogens* norms as enjoying a "higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules". See also *R (Al Rawi and Others) v. Secretary of State for Foreign and Commonwealth Affairs and Another* (note 50 above), para. 101, citing *R v. Bow Street Metropolitan Stipendiary Magistrate and Others: Ex Parte Pinochet (No. 3)* [2000] 1 AC 147, p. 198.

[68] *Julio Héctor Simón y Otros s/ privación ilegítima de la libertad*, Case No. 17/768, judgment of 14 June 2005, para. 48 ("que se encuentra no sólo por encima de los tratados sino incluso por sobre todas las fuentes del derecho"). See also *Julio Lilo Mazzeo y Otros s/ Rec. de Casacion e Inconstitucionalidad*, judgment of 13 July 2007, para. 15 (*jus cogens* "is the highest source of international law" *["se trata de la más alta fuente del derecho internacional."]*).

[69] See concurring opinion of Lord Hoffman in *Jones v. Ministry of Interior for the Kingdom of Saudi Arabia and Others* [2007] 1 AC 270, para. 39.

over both customary international law and treaties".[70] Italian courts have similarly held that *jus cogens* norms hold a higher rank than other norms.[71]

27. From the above, it should be clear that hierarchical superiority as a descriptive, characteristic element of *jus cogens* cannot be seriously questioned. Different terms may have been utilized, but the idea of *jus cogens* being hierarchically superior or having a higher status is generally accepted.

3. Universal application

28. The idea that *jus cogens* norms are universally applicable denotes the fact that they apply to all States. As with the other two elements, it is well-supported in State practice and international judicial practice (referred to herein by the shorthand "State and judicial practice"). The first report provided support for this element in the form of decisions of courts[72] and scholarly writings.[73]

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[70] *Mani Kumari Sabbithi et al v. Major Waleed KH N.S. Al Saleh* 605 F. Supp 2d 122 (United States District Court for the District of Columbia), p. 129.

[71] *Mario Luiz Lozano v. the General Prosecutor for the Italian Republic*, appeal judgment of 24 July 2008, Supreme Court of Cassation, First Criminal Chamber, Italy, Case No. 31171/2008, p. 6 ("dandosi prevalenza al principio di rango più elevato e di *jus cogens*" [priority should be given to the principle of higher rank and of *jus cogens*]). See also *Germany v. De Guglielmi and De Guglielmi and Italy (joining)*, appeal judgment of 14 May 2012, Turin Court of Appeal, Case No. 941/2012, ILDC 1905 (IT 2012), p. 15.

[72] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at para. 190 ("The United States, in its Counter-Memorial on the questions of jurisdiction and admissibility, found it material to quote the views of scholars that this principle is a 'universal norm', a 'universal international law', a 'universally recognized principle of international law', and a 'principle of *jus cogens*'"). See also *Reservations to the Convention on Genocide, Advisory Opinion* (note 44 above), p. 23, where the International Court of Justice refers to "the universal character ... of the condemnation of genocide"; separate opinion of Judge Moreno Quintana in the *Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden), Judgment of 28 November 1958* (www.icj-cij.org/docket/files/33/2271.pdf), pp. 106-107 ("These principles .... have a peremptory character and a universal scope"); and *Hanoch Tel-Oren et al v Libyan Arab Republic et al*, Judgment of 3 February 1984 of the United States Court of Appeal, District of Columbia, 726 F.2d 774, 233 U.S.App. D.C. 384 (there are a "handful of heinous actions — each of which violates definable, universal and obligatory norms").

[73] See, for example, William Conklin "The peremptory norms of the international community", in *European Journal of International Law*, vol. 23, No. 3 (Oxford University Press, 2012). See also Christos Rozakis, *The Concept of* Jus Cogens *in the Law of Treaties* (Amsterdam, North-Holland Publishing Company 1976), p. 78; Giorgio Gaja, "Jus cogens beyond the Vienna Convention", in *Collected Courses of the Hague Academy of International Law*, vol. 172 (1981), p. 283; Gennadii Danilenko, *Law-Making in the International Community* (Dordrecht, Marinus Nijhoff Publishers, 1993), p. 211; Levan Alexidze, "Legal nature of *jus cogens* in contemporary international law", in *Collected Courses of the Hague Academy of International Law*, vol. 172 (1981), p. 246; Pierre-Marie Dupuy and Yann Kerbrat, *Droit international public*, (11th edition, Paris, 2012), p. 322 ("la cohésion de cet ensemble normatif exige la reconnaissance par tout ses sujets d'un minimum de règles *imperatives*" ["the cohesion of this set of standards requires recognition by all its subjects of a minimum of mandatory rules"]); Aldana Rohr, *La responsabilidad internacional del Estado por violación al jus cogens* (Buenos Aires, 2015), p. 6; Dan Dubois, "The authority of peremptory norms in international law: State consent or natural law?", in *Nordic Journal of International Law*, vol. 78 (Marinus Nijhoff Publishers, 2009), p. 135 ("A *jus cogens* ... is applicable to all States regardless of their consenting to it."); and Matthew Saul, "Identifying *jus*

29. The Inter-American Court has described *jus cogens* norms being "applicable to all States" and as ones which "bind all States".[74] Similarly, in *Michael Domingues*, the Inter-American Commission determined that *jus cogens* norms "bind the international community as a whole, irrespective of protest, recognition or acquiescence".[75] The United States Court of Appeals has described *jus cogens* norms as those that "do not depend on the consent of individual States but are universally binding by their very nature".[76] Similarly, in *Belhas v. Moshe Ya'Alon*, the United States Court of Appeals for the District of Columbia described *jus cogens* norms as "norms so universally accepted that all States are deemed to be bound by them under international law".[77] Similarly, the Swiss Federal Supreme Court decided that the norms of *jus cogens* were "binding on all subjects of international law".[78]

30. The materials cited above illustrate that, in their practice, States and courts have consistently accepted that *jus cogens* norms protect and reflect fundamental values of the international community, are universally applied and are hierarchically superior to other norms of international law. That these materials may, at times, use different words to express the same basic ideas should not detract from the wide acceptance of these characteristics.

III. Criteria for *jus cogens*

A. General

31. It is perhaps useful to make two preliminary points. First, the question of who determines whether the criteria have been met falls beyond the scope of the topic. That said, future reports, in connection with the consequences of *jus cogens* for treaty law, in particular invalidity of treaty, will have to address article 66 of the Vienna Convention concerning the compulsory adjudication of a dispute relating to the invalidity of a treaty on account of *jus cogens*. Second, the elements in paragraph 2 of draft conclusion 3 proposed in the first report of the Special Rapporteur are not criteria for *jus cogens*. They are descriptive elements of *jus cogens* norms. The criteria, or requirements, for the identification of *jus cogens* norms of international law refer to the elements that should be present before a rule

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cogens norms: the interaction of scholars and international judges", in *Asian Journal of International Law* (2014), p. 31 ("*Jus cogens* norms are supposed to be binding on all States").

[74] *Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion* OC-18/03 of 17 September 2003, requested by the United Mexican States, paras. 4 and 5. See also the written statement of 19 June 1995 by the Government of Mexico on the request for an advisory opinion on the Legality of the Threat or Use of Nuclear Weapons submitted to the International Court of Justice by the General Assembly in its resolution 49/75 K) of 19 June 1995, para. 7 ("These norms ... are of a legally binding nature for all the States (*jus cogens*)". For the text of the written statement, see www.icj-cij.org/docket/files/95/8694.pdf.

[75] *Michael Domingues* (note 46 above), para. 49.

[76] *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2nd. Cir. 1996), p. 242.

[77] *Belhas v. Moshe Ya'Alon*, 515 F.3d 1279 (District of Columbia Cir. 2008 Cir. 2008), pp. 1291-2.

[78] *Youssef Nada v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Administrative appeal, judgment of 14 November 2007, Federal Supreme Court of Switzerland, Case No. 1A 45/2007, ILDC 461 (CH 2007), para. 7.

or principle can be called a norm of *jus cogens*. It is these criteria that are the subject of the present section of the second report.

32. As alluded to by the Sudan, the identification of *jus cogens* norms is a complex process.[79] Similarly, in the commentary to draft article 50 of the Commission's 1966 draft articles on the law of treaties, the Commission noted that "there is no simple criterion" by which to identify a norm of *jus cogens*.[80] During the debate in the Sixth Committee in 2016, many States emphasized that the criteria for *jus cogens* should be based on article 53 of the Vienna Convention.[81] The Special Rapporteur did not interpret the view that the criteria for *jus cogens* should be based on article 53 of the Vienna Convention to mean that the Commission may not move beyond article 53 *even if practice so determined*, as might be inferred from the statement of Malaysia.[82] The present report therefore takes, as its point of departure, the elements of article 53 of the Vienna Convention as the basis for the criteria for the identification of *jus cogens* norms. However, State practice and the decisions of international courts and tribunals are relied upon to give content and meaning to article 53.

33. The decision to proceed from the basis of article 53 is not only based on the views expressed by States during the debate in the General Assembly. It is generally consistent with practice and scholarly writings. When referring to *jus cogens*, international courts and tribunals generally referred to article 53 of the Convention.[83] Moreover, much of the academic literature proceeds from the premise

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[79] Statement of Sudan, A/C.6/71/SR.25, para. 73.

[80] See para. (2) of the commentary to draft article 50 of the Draft Articles on the Law of Treaties (1966), *Yearbook of the International Law Commission, 1966*, vol. II (United Nations publication, Sales No. 67.V.2), Part II, chap. II, sect. C.

[81] See, for example, the statement by Czechia (A/C.6/71/SR.24, para. 72). See also the statements by Canada (A/C.6/71/SR 27, para. 9), Chile (A/C.6/71/SR 25, para. 101), China (A/C.6/71/SR.24, para. 89), the Islamic Republic of Iran (A/C.6/71/SR.26, para. 118: "The aim of the Commission's work on the topic was not to contest the two criteria established under Article 53 ... On the contrary the goal was to elucidate the meaning and scope of the criteria ...") and Poland (A/C.6/71/SR.26, para. 56). See further the statement by Ireland (A/C.6/71/SR.27, para. 19: "Her delegation agreed with the view that Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties should be central to work on the topic ...").

[82] See the statement by Malaysia (A/C.6/71/SR.26, para. 75: "On the topic of *jus cogens*, her delegation cautioned against expanding the principle beyond the language of article 53 of the Vienna Convention on the Law of Treaties. Given that international law was developing through consent-based instruments, it would be unwise to widen a principle whereby certain universal norms could bind States, with or without their consent").

[83] See, for example, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, para. 83; *Prosecutor v. Furundžija* (note 45 above), para. 155; *Prosecutor v. Jelisić*, Case No. IT-95-10-T, 14 December 1999, para. 60. See also Constitutional Tribunal of Colombia, *Sentencia*, Case No. C-578/95. See, especially, separate opinion of Judge ad hoc Dugard in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application, Judgment* (www.icj-cij.org/docket/files/126/10449.pdf), para. 8.

that article 53 provides the definition for *jus cogens*.[84] Moreover, the syllabus on which the topic is based also recognizes article 53 of the Vienna Convention as "the starting point for any study of *jus cogens*".[85]

34. Before addressing the text of article 53, it is important to emphasize that the criteria developed in this report are based not on predetermined views or particular philosophical inclinations of the Special Rapporteur, but on the relevant materials of practice. They are not, and ought not to be, based on the intention to propagate a narrow or broad approach, or a natural law or positive law approach.

35. Since the criteria for *jus cogens* are based on article 53 of the Vienna Convention, it is worth recalling the terms of the article:

> "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

36. The first sentence of article 53 is not definitional. It rather set outs the consequence, from the perspective of treaty law, of conflict with *jus cogens*. It is the second sentence that sets out the definition of *jus cogens* norms of international law.[86] Article 53 does spell out that the definition is for the purposes of the Vienna Convention. However, as stated in paragraphs 32 and 33 above, the definition in the Vienna Convention is accepted as the definition, in general terms, of *jus cogens*, even beyond the law of treaties.[87] The Commission itself, whenever it has

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[84] See, for example, Sévrine Knuchel, *Jus Cogens: Identification and Enforcement of Peremptory Norms* (Zurich, Schulthess, 2015), p. 19 ("Given that Article 53 provides the only written legal definition of the effects of *jus cogens* ... as well as the process by which such norms come into being ... it is the necessary starting point for analysing this concept"); Ulf Linderfalk, "Understanding the *jus cogens* debate: the pervasive influence of legal positivism and legal idealism", in *Netherlands Yearbook of International Law: Jus Cogens — Quo Vadis?*, vol. 46 (T.M.C. Asser Press, 2016), p. 52. See also Stefan Kadelbach, "Genesis, function and identification of *jus cogens* norms", in *Netherlands Yearbook of International Law: Jus Cogens — Quo Vadis?*, vol. 46 (T.M.C. Asser Press, 2016), p. 166, noting that "treatises on *jus cogens* usually start" with article 53 of the Vienna Convention.

[85] See *Official Records of the General Assembly, Sixty-Ninth Session, Supplement No. 10* (A/69/10), annex, para. 7.

[86] Dinah Shelton, "Sherlock Holmes and the mystery of *jus cogens*", in *Netherlands Yearbook of International Law: Jus Cogens — Quo Vadis?*, vol. 46 (T.M.C. Asser Press, 2016), p. 26. See also Ulf Linderfalk, "The creation of *jus cogens*: making sense of Article 53 of the Vienna Convention", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* [*Heidelberg Journal of International Law*], vol. 71, No. 2 (2011) pp. 359-378.

[87] Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (Cambridge, Cambridge University Press, 2015), p. 6 ("Although the Vienna Convention concerns the law of treaties and binds only signatories ... Article 53 reflected a concept with legal effect beyond the treaty context").

considered *jus cogens* in the context of other subjects, has relied on the definition contained in article 53 of the Vienna Convention.[88]

37. Article 53 sets forth two cumulative criteria for the identification of *jus cogens*. First, the relevant norm must be a norm of general international law. Second, this norm of general international law must be accepted and recognized as having certain characteristics, namely that it is one from which no derogation is permitted and one which can be modified only by a subsequent norm of *jus cogens*.[89] Sévrine Knuchel sees article 53 as comprising three elements, namely, norm of general international law, acceptance and recognition as a norm from which no derogation is permitted and that such norms may only be modified by a subsequent norm of *jus cogens*.[90] Yet, from a definitional perspective, the third element is, first of all, not a criterion but only describes how an existing norm of *jus cogens* can be modified. This comes *after* the identification of a norm as a *jus*

[88] See para. (5) of the commentary to article 26 of the draft articles on the Responsibility of States for Internationally Wrongful Acts (2001), *Yearbook of the International Law Commission, 2001*, vol. II, Part Two (United Nations publication, Sales No. E.04.V.17 (Part 2), p. 85 ("The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the 1969 Vienna Convention requires not merely that the norm in question should meet all the criteria for recognition as a norm of general international law ... but further that it should be recognized as having peremptory character by the international community of States as whole."). See also the conclusions of the work of the Study Group on fragmentation of international law (note 57 above), para. (32) ("A rule of international law may be superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority. This is the case of peremptory norms of international law (*jus cogens*, article 53 of the 1969 Vienna Convention), that is, norms 'accepted and recognized by the international community of States as a whole from which no derogation is permitted'."). See further, though not a product of the Commission, the report of the Study Group, A/CN.4/L.682, para. 375 ("The starting point [for establishing the criteria] must be the formulation of article 53 itself, identifying *jus cogens* by reference to what is 'accepted and recognized by the international community of States as a whole'.").

[89] See also the statement by Ireland (A/C.6/71/SR.27, para. 20). See, especially, Court of Appeal for Ontario, *Bouzari and Others v. Islamic Republic of Iran* (2013) 71 OR (3d) 675, para. 86, where the Court of Appeal for Ontario, having determined that the *jus cogens* is a higher form of customary international law, makes clear that the non-derogation elements in article 53 is qualified by the element of recognition and acceptance. ("A peremptory norm of customary international law or rule of *jus cogens* is a higher form of customary international law. It is one accepted and recognized by the international community of States as a norm from which no derogation is permitted."). See also Erika de Wet, "*Jus cogens* and obligations *erga omnes*" in *The Oxford Handbook of International Human Rights Law*, Dinah Shelton, ed. (Oxford, Oxford University Press, 2013), p. 542 ("In essence, this implies that a particular norm is first recognized as customary international law, whereafter the international community of States as a whole further agrees that it is a norm from which no derogation is permitted."); see also Jure Vidmar, "Norm conflicts and hierarchy in international law: towards a vertical international legal system?", in *Hierarchy in International Law: The Place of Human Rights*, Erika de Wet and Jure Vidmar, eds. (Oxford, Oxford Scholarship Online, 2011), p. 25.

[90] Knuchel (note 84 above), pp. 49-136. See also the statement by the Islamic Republic of Iran (A/C.6/71/SR.26, para. 118), where the two criteria identified are said to be, first, a norm recognised by the international community of States as a whole as a norm from which no derogation was permitted, and, second, a norm which could be modified only by a subsequent *jus cogens* norm.

cogens and can therefore not be a criterion for its identification.[91] Moreover, even as part of the definition, it is not an independent criterion but rather forms part of the "acceptance and recognition" criterion.

38. Textually, there are other ways that article 53 could be interpreted. It is possible, from a textual perspective, to interpret the "accepted and recognized" as qualifying the "general international law" rather than the non-derogation language. Seen from this perspective, article 53 would have three criteria, as follows: (a) a norm of general international law which is recognized (as such) by the international community of States as a whole; (b) a norm from which no derogation is permitted; and (c) a norm which can only be modified by another norm of *jus cogens*. Apart from the fact that neither practice nor the negotiating history of article 53 supports such an interpretation, it would also raise a number of difficulties. First, it would render the first criterion tautologous, since "general international law" ought to be generally accepted and recognized by the international community. Second, in that form the second and third criteria would not be criteria but rather a consequence of *jus cogens* and a description of how *jus cogens* norms can be modified, respectively.

39. Based on the above, for a rule to qualify as a norm of *jus cogens* it has to be a norm of general international law and it has to be accepted and recognized as a norm from which no derogation is permitted. The report will consider each of these criteria in turn.

B. First criterion: a norm of general international law

40. The first criterion, namely that *jus cogens* are norms of general international law, is explicitly spelled out in article 53. Moreover, the view that what *jus cogens* refers to is a "norm of general international law" is repeated several times in the commentary to draft article 50 of the Commission's articles on the law of treaties.[92] It is worth pointing out that, during the Vienna Conference, many drafting suggestions to amend the Commission's text were made, but none concerned the concept of "norm of general international law". It was accepted as a given and all delegates who spoke on various aspects of *jus cogens* defined it in those terms.[93] Moreover, judicial decisions, both international and domestic, have consistently adopted the approach that *jus cogens* norms of international law emerge from norms

[91] See also the statement by Greece, at the fifty-second meeting, in the *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968: Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), para. 19. ("In his view the third element led to a vicious circle, for the fact that a rule of *jus cogens* could be modified only by a rule 'having the same character' could not be one of the conditions governing the 'character' of the rule.").

[92] See, for example, para. (2) of the commentary to draft article 50 (note 80 above).

[93] See, for example, the following statements in the *Official Records of the United Nations Conference on the Law of Treaties* (note 91 above): fifty-second meeting, Union of Soviet Socialist Republics, para. 3, Greece, para. 19; Cuba, para. 34; fifty-third meeting, Nigeria, para. 48, Austria, para. 42, Uruguay, para. 51.

of general international law.[94] Echoing the same point, Knuchel observes that this first criterion "addresses the process by which the norm is created, as opposed to the process by which it acquires peremptory status".[95] This suggests that the first criterion implies a two-step process for the emergence of *jus cogens* norms, namely, the establishment of a "normal" rule under general international law and the "elevation" of that rule to the status of *jus cogens*.[96] This two-step process is aptly captured by the Commission in the commentaries to the articles on state responsibility:

> "The criteria for identifying peremptory norms of general international law are stringent. Article 53 of the 1969 Vienna Convention requires not merely that the norm in question meet all the criteria for recognition as a norm of general international law, binding as such, but *further* that it should be recognized as having peremptory character by the international community of States as a whole."[97]

41. The concept of "norm of general international law" as a criterion has, thus, not been in doubt. What may be an issue is precisely what this criterion means. The Study Group on fragmentation of international law established by the International Law Commission observed that "there is no accepted definition of 'general international law'".[98] Nonetheless, elements of the concept can be deduced from the practice and literature. The Study Group itself distinguishes between, inter alia, general international law, on the one hand, and *lex specialis*[99] and treaty law,[100]

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[94] See, for example, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, para. 99 ("the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)"); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, *I.C.J. Reports 2010*, p. 403, para. 81 ("egregious violations of norms of general international law, in particular those of peremptory character (*jus cogens*"); *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 1988) (United States of America), at 373 ("some customary norms of international law reach a 'higher status', in which they 'are recognized by the international community of States as peremptory ...'"); and *Kazemi Estate v. Islamic Republic of Iran* [2014] *Supreme Court of Canada 62*, 3 SCR 176, p. 209.

[95] See Knuchel (note 84 above), p. 49. See also Linderfalk (note 86 above), p. 371 ("... by 'the creation of a rule of *jus cogens*' I mean, not the creation of a rule of law, but rather the elevation of a rule of law to a *jus cogens* status").

[96] Raphaële Rivier, *Droit international public*, 2nd edition (Paris, Presses Universitaires de France, 2013), p. 566 ("*Ne peut accéder au rang de règle impérative qu'une provision déjà formalisée en droit positif et universellement acceptée comme règle de droit*." [Only a provision already formalized in positive law and universally accepted as law can achieve the rank of peremptory norm].)

[97] Para. (5) of the commentary to article 26 of the draft articles on the Responsibility of States for Internationally Wrongful Acts (note 88 above).

[98] *Yearbook of the International Law Commission, 2006*, vol. II, Part Two, chap. XII, sect. D.2, para. (10), footnote 976. The Study Group pointed out, rather, that the meaning of the term was context-specific.

[99] See A/CN.4/L.682, para. 8 ("What once appeared to be governed by 'general international law' has become the field of operation for such specialist systems as 'trade law', 'human rights law', 'environmental law', 'law of the sea', 'European law' and even such exotic and highly specialized knowledges as 'investment law' or 'international refugee law', etc."). See also paras. 81 and 194.

[100] Ibid., para. 92. It should be noted that the Study Group, in some respects, treats treaty law as *lex specialis*.

respectively, on the other hand. The distinction between general international law on the one hand, and treaty law and *lex specialis* on the other hand, appears to be borne out by the International Court of Justice in the *Military and Paramilitary Activities* case.[101] Yet this distinction *might* preclude some rules, such as those of international humanitarian law, from acquiring the status of *jus cogens*. Indeed the text from the *Gabcíkovo-Nagymaros* case,[102] on which the Study Group relied, illustrates the point. There the Court was referring to the special rules developed between the parties, Slovakia and Hungary, and which were distinct from rules that were generally applicable to the international community of States.

42. It would seem, thus, that the "general" in norms of general international law", in the context of article 53, refers to the scope of applicability. This understanding seems consistent with the approach adopted in judgments, advisory opinions and individual opinions of the International Court of Justice. Although, in the *North Sea Continental Shelf* cases, the Court did not employ the word "general" when making a distinction between "rules of international law [that] can, by agreement, be derogated from in particular cases, or as between particular parties" and rules of *jus cogens* which cannot, it is these former rules that apply generally between States, but which can be derogated from by (more) specific rules, to which the term "general rules of international law" refers.[103] The distinction between general international law and *lex specialis*, alluded to by the Study Group, was put into context by the Court when it made the distinction between "purely conventional rules and obligations [regarding which] some faculty of making unilateral reservations may, within certain limits, be admitted" and "general or customary law rules and obligations which ... must have equal force for all members of the international community".[104]

43. The most obvious manifestation of general international law is customary international law.[105] Indeed many see customary international law as the most common basis for the formation of *jus cogens* norms.[106] Gérard Cahin, for example, observes that customary international law is "a normal and common, if not

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[101] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 274. See also *Gabcíkovo-Nagymaros Project (Hungary Slovakia), Judgment, I.C.J. Reports 1997*, p. 76, para. 132.

[102] *Gabcíkovo-Nagymaros Project* (note 101 above), para. 132, where the Court noted that the relationship between Slovakia and Hungary was governed by, inter alia, both "the rules of general international law" and "above all, by the applicable rules of the 1977 Treaty as a *lex specialis*".

[103] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, para. 72.

[104] Ibid., para. 63.

[105] Antonio Cassese, "For an enhanced role of *jus cogens*" in Antonio Cassese, ed., *Realizing Utopia: The Future of International Law* (Oxford, 2012), p.164 ("The second question amounts to asking by which means an international tribunal should ascertain whether a general rule or principle of international law has acquired the status of a peremptory norm. Logically, this presupposes the existence of such a *customary* rule or principle.") (emphasis in original). See also Erika de Wet (note 89 above), p. 542.

[106] See, for discussion, Knuchel (note 84 above), p. 86.

exclusive, means of formation of *jus cogens* norms."[107] The strong relationship between the rules of customary international law and norms of *jus cogens* is reflected in the statements by States in the General Assembly over the years.[108] The notion that norms of *jus cogens* are constituted by rules of customary international law is equally borne out in case law of both domestic and international courts. In *Questions Relating to the Obligation to Prosecute or Extradite*, the International Court of Justice recognized the prohibition of torture as "part of customary international law" that "has become a peremptory norm (*jus cogens*)."[109] Similarly, the Court's description of "many of the rules of humanitarian law" as constituting "intransgressible principles of international customary law" confirms the idea that *jus cogens* norms — referred to by the Court as "intransgressible principles" — have a customary basis.[110]

44. Decisions of other international tribunals confirm the relationship between customary international law and norms of *jus cogens*. The International Tribunal for the Former Yugoslavia, for example, has noted that the prohibition against torture is a "norm of customary international law" and that it "further constitutes a norm of

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[107] Gérard Cahin, *La Coutume internationale et les organisations internationales: l'incidence de la dimension institutionnelle sur le processus coutumier*, in *Revue générale de droit international public*, No. 52 (Pédone, 2001), p. 615 ("*voie normale et fréquente sinon exclusive*"). See also Raphaële Rivier, *Droit international public* (note 96 above), p. 566 ("*Le mode coutumier est donc au premier rang pour donner naissance aux règles destinées à alimenter le droit impératif.*" [Customary international law is thus a primary source of rules that will form the basis of mandatory law]). See, additionally, Antonio Cassese, *International Law*, 2nd edition (Oxford, Oxford University Press, 2005), p. 199 ("a special class of *general rules* made by custom has been endowed with a *special legal force*: they are peremptory in nature and make up the so-called *jus cogens*"). See, further, João Ernesto Christófolo, *Solving Antinomies between Peremptory Norms in Public International Law* (Zurich, Schulthess, 2016), p. 115 ("As the most likely source of general international law, customary norms would constitute *ipso facto* and *ipso iure* a privileged source of *ius cogens* norms"). See, for a contrary view, Mark Janis, "The nature of *jus cogens*", in *Connecticut Journal of International Law*, vol. 3, No. 2 (1988), p. 361.

[108] See the statement by Pakistan at the thirty-fourth session of the General Assembly, A/C.6/34/SR.22, para. 8 ("The principle of the non-use of force, and its corollary, were *jus cogens* not only by virtue of Article 103 of the Charter but also because they had become norms of customary international law recognized by the international community"). See also the statements by the United Kingdom (A/C.6/34/SR.61, para. 46) and Jamaica, (A/C.6/42/SR.29, para. 3: "The right of peoples to self-determination and independence was a right under customary international law, and perhaps even a peremptory norm of general international law"). See also the written statement by Jordan in connection with the request for an advisory opinion of the International Court of Justice on the legal consequences of the construction of a wall in the Occupied Palestinian Territory, 30 January 2004 (http://www.icj-cij.org/docket/files/131/1559.pdf), paras. 5.42-5.45.

[109] *Questions Relating to the Obligation to Prosecute or Extradite* (note 94 above), para. 99. See also *Military and Paramilitary Activities in and against Nicaragua* (note 72 above), para. 190.

[110] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (note 83 above), para. 79. See also *Bosnia and Herzegovina v. Serbia and Montenegro* (note 42 above), p. 161. See, further, the separate opinion of Judge Simma in *Oil Platforms (Islamic Republic of Iran v. United States of America)*, judgment of 6 November 2003 (www.icj-cij.org/docket/files/90/9735.pdf), para. 6 ("I find it regrettable that the Court has not mustered the courage of restating, and thus reconfirming, more fully fundamental principles of the law of the United Nations as well as customary international law (principles that in my view are of the nature of *jus cogens*) on the use of force, or rather the prohibition on armed force").

jus cogens."[111] In *Furundžija*, the Tribunal described *jus cogens* norms as those that "enjoy a higher rank in the hierarchy of international law than treaty law or even 'ordinary' customary rules."[112] This quote appears to make a distinction between "ordinary" rules of customary international law and norms of *jus cogens* as a particular form of customary international law. Similarly, in *Jelisić* the Court stated that "there can be absolutely no doubt" that the prohibition against genocide in the Genocide Convention falls "under customary international law" and is now "at the level of *jus cogens*."[113]

45. Domestic courts have similarly confirmed customary international law as the source of many *jus cogens* norms. In *Siderman de Blake*, the United States Court of Appeals described *jus cogens* norms as "an elite subset of the norms recognized as customary international law."[114] The Court also noted that, in contrast to ordinary rules of customary international law, *jus cogens* "embraces customary laws considered binding on all nations".[115] In *Buell*, the United States Court of Appeals also noted, with respect to *jus cogens*, that some customary norms of international law reach a "higher status", namely that of *jus cogens*.[116] In *Kazemi Estate* the Supreme Court of Canada described *jus cogens* norms as a "higher form of customary international law".[117]

46. The Supreme Court of Argentina similarly recognized that *jus cogens* norms relative to war crimes and crimes against humanity emerged from rules of customary international law already in force.[118] Similarly, the Constitutional Tribunal of Peru stated that *jus cogens* rules referred to "customary international norms which, under the auspices of an *opinio juris seu necessitatis*, ...".[119] In *Bayan Muna*, the Philippines defined *jus cogens* as "the highest hierarchical position among all other customary norms and principles."[120] Similarly, in *Kenya Section of*

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[111] *Prosecutor v. Delalić et al.*, Judgement, Case No. IT-96-21-T, T.Ch., 16 November 1998, para. 454.

[112] *Furundžija* (note 45 above), para. 153.

[113] *Prosecutor v. Jelisić, Judgement*, Case No. IT-95-10-T, T.Ch., 14 December 1999, para. 60.

[114] *Siderman de Blake v. Argentina* (note 48 above), p. 715, citing *Committee of United States Citizens Living in Nicaragua v. Reagan* 859 F.2d 929 (DC Cir. 1988), p. 940.

[115] Ibid. This contrast between "ordinary" rules of customary international law and *jus cogens* — suggesting the latter constitutes extraordinary rules of customary international law — is often based on the decision of the International Tribunal for the Former Yugoslavia in *Furundžija* (note 45 above), at para. 153, where a similar distinction is drawn. It has been mentioned, with approval, in several decisions, including decisions of the courts of the United Kingdom. See, for example, *R v. Bow Street Metropolitan Stipendiary Magistrate and Others: Ex Parte Pinochet* (note 67 above), p. 198. See also *R (Al Rawi and Others) v. Secretary of State for Foreign and Commonwealth Affairs and Another* (note 50 above), para. 101.

[116] *Buell v. Mitchell* (note 94 above), p. 373.

[117] See *Kazemi Estate v. Islamic Republic of Iran* (note 94 above), para. 151. See also *Steen v. Islamic Republic of Iran*, 2013 ONCA 30, 114 O.R. (3d) 206, para. 30 ("Peremptory norms of international law, or *jus cogens*, are high forms of customary international law from which no derogation is permitted"); *Bouzari* (note 89 above), para. 86 ("A peremptory norm of customary international law or rule of *jus cogens* is a higher form of customary international law").

[118] See *Arancibia Clavel* (note 53 above), para. 28.

[119] Exp. No 0024-2010-PI/TC (note 51 above), para. 53 ("Las normas de *jus cogens* parecen pues encontrarse referidas a normas internacionales consuetudinarias que bajo el auspicio de una *opinio juris seu necessitatis* ...").

[120] *Bayan Muna* (note 52 above).

the International Commission of Jurists v. The Attorney-General and Others, the High Court of Kenya determined the "duty to prosecute international crimes" to be both a rule of customary international law and a norm of *jus cogens*.[121] The Kenya Court of Appeal noted that, even if Kenya had not ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[122] it would "still have been bound to proscribe torture within its territory under customary international law", which, the Court continued, is a principle of *jus cogens* and is a peremptory norm of international law.[123] Similarly, Italian courts had also recognized that *jus cogens* norms emerged from rules of customary international law.[124]

47. Based on the foregoing, it can be concluded that customary international law rules qualify as norms of general international law for the purposes of the criteria for *jus cogens* derived from article 53 of the Vienna Convention.

48. Another general source of international law is the general principles of law recognized by civilized nations (hereinafter "general principles of law") in Article 38(1)(c) of the Statute of the International Court of Justice.[125] General principles of law, like rules of customary international law, are generally applicable. Unlike treaty law, the scope of general principles of law is not limited to the specific parties to the treaty. However, while there is ample authority in practice for the proposition that customary international law rules form the basis of *jus cogens* norms, there is significantly less authority for the proposition that general principles of law also constitute a basis for *jus cogens* norms.

49. There is, however, sufficient support in literature.[126] Moreover, it is clear that when the Commission determined *jus cogens* norms to be "norms of general

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[121] *Kenya Section of the International Commission of Jurists v. the Attorney-General and Others*, Judgment of the High Court of Kenya of 28 November 2011, [2011] eKLR, para. 14.

[122] United Nations, *Treaty Series*, vol. 1465, No. 24841.

[123] *Koigi Wamwere v. The Attorney-General*, Judgment of the Court of Appeal of Kenya of 6 March 2015, [2015] eKLR, para. 6.

[124] *Germany v. Milde (Max Josef)*, Appeal Judgment of 13 January 2009, 1st Criminal Section, case No. 1072/2009, ILDC 1224 (IT 2009), para. 6 ("customary rules aiming to protect inviolable human rights did not permit derogation because they belonged to peremptory international law or *jus cogens*").

[125] Article 38(1)(c) of the Statute of the International Court of Justice provides that the Court shall apply "the general principles of law recognized by civilized nations".

[126] See, for example, Knuchel (note 84 above), p. 52 ("general principles [of law] may be elevated to *jus cogens* if the international community of States recognise and accept them as such"); Shelton (note 86 above), paras. 30-34; Antônio Augusto Cançado Trindade, "*Jus Cogens*: the determination and the gradual expansion of its material content in contemporary international case law", in *XXXV Curso de Derecho Internacional* (Rio de Janeiro, Brazil, 2008), p. 27. See also Weatherall (note 87 above), p. 133; Thomas Kleinlein, "*Jus Cogens* as the 'highest law'? Peremptory norms and legal hierarchies", in Maarten den Heijer and Harmen van der Wilt, eds., *Netherlands Yearbook of International Law 2015* (The Hague, T.M.C. Asser Press, 2015), p. 195 ("a peremptory norm must first become general international law i.e. customary international law or general principles of law pursuant to Article 38(1) of the ICJ Statute"). See also William E. Conklin, "The peremptory norms of the international community", *European Journal of International Law* vol. 23, No. 3 (2012), p. 840; Omar M. Dajani, "Contractualism in the law of treaties", *Michigan Journal of International Law*, vol. 34, No. 1 (2012), p. 60; Andrea Bianchi, "Human rights and the magic of *Jus Cogens*", *European Journal of International Law* vol. 19, No. 3 (2008), p. 493 ("The possibility that *jus cogens* could be created by treaty stands in sharp

international law" it included, in the phrase "general international law", also general principles of law. The first time that the notion of invalidity of a treaty on account of a violation of a general rule of international law was considered was in the first report of Sir Hersch Lauterpacht (the fourth report overall) on the law of treaties.[127] In the commentary to draft article 15 on the law of treaties, Lauterpacht regarded norms of *jus cogens* "as constituting principles of international public policy" and "as forming part of those principles of law generally recognized by civilized nations" (general principles of law).[128] Members of the Commission also generally accepted that general principles of law could give rise to norms of *jus cogens*.[129]

50. It has been contended that at the Vienna Conference, delegations did not believe that general principles of law could be the source of *jus cogens* norms.[130] This view appears to be based on the consideration that a proposal by the United States to the text of the Commission was rejected on account of the fact that some States interpreted it as "implying that peremptory norms would arise from the third source of international law", namely general principles.[131] It seems, however, that this was not the import of the proposal.[132] The proposal seems to have been intended, rather than to introduce a new source of *jus cogens*, to introduce an additional requirement, namely that in addition to being a norm of general international law, the said norm should enjoy recognition by national and regional

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contrast to the view that peremptory norms can emerge only from customary law"); Rafael Nieto-Navia, "International peremptory norms *(Jus Cogens)* and international humanitarian law", in Lal Chand Vorah and others, eds., *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (The Hague, 2003), pp. 613-615 ("One can state generally that norms of *jus cogens* can be drawn generally from the following identified sources of international law: (i) General treaties [...] and (ii) General principles of law recognized by civilized nations"); Alexander Orakhelashvili, *Peremptory Norms in International Law* (New York, Oxford University Press, 2006), p. 126; and Elizabeth Santalla Vargas, "In quest of the practical value of *Jus Cogens* norms", *Netherlands Yearbook of International Law 2015*, p. 214 ("*jus cogens* derives from customary law and general principles of international law").

[127] Report on the law of treaties by Sir Hersch Lauterpacht, Special Rapporteur, A/CN.4/63, in *Yearbook of the International Law Commission, 1953*, vol. II (United Nations publication, Sales No. 59.V.4, Vol. II).

[128] Ibid., para. 4 of the commentary to article 15.

[129] See, for example, the statement of Mr. de Luna, quoting Lord McNair, in *Yearbook of the International Law Commission 1966*, vol. I (Part I) (United Nations publication, Sales No. 67.V.1), summary records, 828th meeting, para. 31; and the statements of Mr. Tunkin (summary records, 684th meeting, para. 21) and Mr. Gros (summary records, 682nd meeting, para. 70 in *Yearbook of the International Law Commission 1963*, vol. I (United Nations publications, Sales No. 63.V.1, Vol. I).

[130] Knuchel (note 84 above), para. 44 ("State representatives did not seem to consider the general principles of law recognised by civilised nations mentioned in Article 38(1)(c) of the ICJ Statute as a possible norm of *jus cogens*.")

[131] Ibid., para. 45.

[132] The United States proposal, contained in document A/CONF.39/C.1/L.302, as recorded in *Official Records of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna 26 March-24 May 1968 and 9 April-22 May 1969: Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 174, provided as follows: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory rule of general international law which is recognized in common by the national and regional legal systems of the world and from which no derogation is permitted."

legal systems.[133] More to the point, States generally rejected the United States proposal for fear that it would create additional requirements and therefore additional burden for the establishment of *jus cogens* norms. In its statement, for example, Cuba expressed opposition to the United States amendment on account of the fact that it "would subordinate the rules of *jus cogens* of international law to national and regional systems" "and would "enable a State to thwart any rule of *jus cogens* by invoking its domestic legislation."[134] Similarly, Poland opposed the United States proposal on the basis that it seemed to suggest the supremacy of the national and regional systems over the international legal order.[135] Even those States that supported the proposal did not generally adopt the view that it implied general principles of law but rather saw it as a confirmation of recognition and acceptance of the norm as *jus cogens*.[136] Moreover, even where States did interpret the proposed amendment as referring to (or at least being linked to) general principles of law, they did not reject it on that account. Uruguay, for example, was opposed to the proposed amendment as it might be interpreted as implying that *all* general principles of law had the status of *jus cogens*.[137] In other words, Uruguay's statement did not exclude the possibility that *some* general principles of law could rise to the level of *jus cogens*.

51. The dearth in actual practice of instances in which general principles were said to be the basis of a *jus cogens* norm does not justify the conclusion that general principles cannot form the basis of *jus cogens* norms.[138] Clearly the text of article 53, by referring to "general international law", was meant to signify that general principles of law could form the basis of *jus cogens* norms. As Knuchel points out, general principles in the sense of Article 38(1)(c) of the Statute of the International Court of Justice constitute "a source generative of international law" and, as such, "may be elevated to *jus cogens*" if they meet the rest of the criteria for such elevation.[139] General principles of law, once accepted as such, create general rights and obligations for States under international law and as such qualify as norms of general international law. The Commission itself, in the context of the conclusions of the work of the Study Group on fragmentation of international law, considered the role of article 31(3)(c) of the Vienna Convention in systemic integration. Article 31(3)(c), it will be recalled, provides that in the interpretation of treaties,

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[133] See statement of the United States, fifty-second meeting, in the *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968: Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), para. 17.

[134] See statement of Cuba, ibid., para. 38.

[135] See statement of Poland, ibid., fifty-third meeting, para. 41.

[136] See for example, statement by Colombia, ibid., para. 30.

[137] See statement of Uruguay, ibid., para. 51. See, however, statement of Trinidad and Tobago, ibid., fifty-sixth meeting, para. 64.

[138] While the practice is not as substantial as that concerning customary international law, there has been some recognition of general principles of law. See, for, example, *Jelisić* (note 113 above), para. 60, where the Tribunal notes that the International Court of Justice, having observed that the prohibition of genocide was a norm of *jus cogens*, stated that the principles underlying the prohibition were "principles ... recognised by civilised nations". See also the statement by the Islamic Republic of Iran (A/C.6/71/SR.26, para. 120: "The general principles of law to which Article 38 of the Statute of the International Court of Justice referred were the best normative foundation for norms of *jus cogens*").

[139] Knuchel (note 84 above), p. 52.

"any relevant rules of international law applicable in the relations between the parties" shall be considered.[140] In its conclusions, the Commission distinguished, in relation to the interpretation of a treaty under article 31(3)(c), between the application of treaty law on the one hand, and of general international law on the other.[141] The latter, according to the Commission, consists of both "customary international law and general principles of law".[142]

52. The phrase "general international law" therefore encompasses, in addition to customary international law, general principles of law.

53. A question that has been posed is whether treaty law, though on the surface not "general international law", could qualify as "general international law" for the purposes of article 53 of the Vienna Convention. On its face, article 53 of the Vienna Convention does not apply to treaty law. As noted above, in the conclusions of the work of the Study Group on fragmentation, the Commission drew a distinction between treaty law and general international law for the purposes of what it called systemic integration.[143] This might suggest that treaty law would not qualify as general international law.

54. Grigory Tunkin suggested that treaty law can constitute general international law.[144] Moreover, it appears that some delegations during the Vienna Conference took the view that treaties could be the source of *jus cogens* norms. Perhaps the clearest statement recognizing treaty law as part of general international law was that of Poland, in which the following was stated:

> "The form or source of such rules was not of essential importance in determining their peremptory character. Some were conventional and some customary. Some first emerged as custom and were later codified in

[140] Conclusions of the work of the Study Group on fragmentation of international law (note 57 above), para. (17).

[141] Ibid., paras. (20) (referring to general international law) and (21) (treaty law).

[142] Ibid., para. (20).

[143] Ibid., paras. (19)-(21). See also the report of the Study Group (A/CN.4/L.682), para. 77.

[144] Grigory Tunkin, "Is general international law customary law only?", *European Journal of International Law*, vol. 4, especially p. 541 ("I believe that international lawyers should accept that general international law now comprises both customary and conventional rules of international law"). See, specifically in the context of *jus cogens*, Grigory I. Tunkin, "*Jus Cogens* in Contemporary International Law", *Toledo Law Review*, vol. 3 (1971), p. 116 (principles of *jus cogens* consist of "rules which have been accepted either expressly by treaty or tacitly by custom" ... "Many norms of general international law are created jointly by treaty and custom"). See also Knuchel (note 84 above), p. 50 ("Contemporary international law comprises, in the words of the ICJ, 'instruments of universal or quasi-universal character', and nothing precludes future conventions from creating universally binding norms which could be elevated to *jus cogens*."). See also Nieto-Navia (note 126 above), p. 613 ("One can state generally that norms of *jus cogens* can be drawn generally from the following identified sources of international law: (i) General treaties [...] and (ii) General principles of law recognized by civilized nations").

multilateral conventions. Some, on the other hand, first appeared in conventions and only passed later into customary law."[145]

55. The more common view, however, is that treaty rules, as such, do not generate norms of general international law that could rise to the status of *jus cogens*.[146] The text of article 53, on which our consideration of *jus cogens* is based, describes norms of *jus cogens* as norms of general international law, which are distinct from treaty rules, the latter applying only to the parties to the treaty. The Commission's commentary to draft article 50 makes a clear distinction between "norms of general international law" and treaty law. The commentary, for example, distinguishes "the general rules of international law" from treaty rules, through which States may contract out of "the general rules of international law."[147] Paragraph (4) of the commentary states that a "modification of a rule of *jus cogens* would today most probably be effected through a general multilateral treaty."[148] This statement could be interpreted as a recognition by the Commission that treaty rules can form the basis of *jus cogens*. However, the following sentence states that such a multilateral treaty would fall outside the scope of the article.[149] The language "norm of general international law" was inserted by the Commission to indicate the exclusion of multilateral treaty law, implying a clear distinction between treaty rules and rules of general international law.[150]

56. That treaty rules do not, as such, constitute norms of general international law does not mean that treaties are irrelevant for general international law and the identification of *jus cogens*. The relationship between general international law — in particular customary international law — and treaty law was described in *North Sea Continental Shelf*.[151] In that case the Court observed that a treaty rule can codify (or be declaratory of) an existing general rule of international law,[152] or the adoption

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[145] See statement by Poland in *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968: Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), fifty-third meeting, para. 34. See also the statement of Trinidad and Tobago at the fifty-sixth meeting, para. 63 ("General multilateral treaties such as the United Nations Charter could also be a source of norms having the character of *jus cogens*").

[146] See Weatherall (note 87 above), pp. 125-126; and Lauri Hannikainen *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Helsinki, Finnish Lawyers' Publishing, 1988), p. 92. See also Bianchi (note 126 above), p. 493; Evan Criddle and Evan Fox-Decent, "A fiduciary theory of jus cogens", *Yale Journal of International Law*, vol. 34, No. 2, p. 341. See further Alexander Orakhelashvili (note 126), p. 113 ("The propensity for academics to place emphasis on custom seems to follow from the general acknowledgment of the unsuitability of treaties to create peremptory norms"); Ulf Linderfalk, "The effect of *jus cogens* norms: whoever opened Pandora's box, did you ever think about the consequences?", *European Journal of International Law* vol. 18, No. 5, p. 860.

[147] Para. (2) of the commentary to draft article 50 of the Draft Articles on the Law of Treaties (note 80 above). The Commission further stated that "it would [not] be correct to say that a provision in a treaty possesses the character of *jus cogens* merely because the parties have stipulated that no derogation from that provision is not permitted".

[148] Ibid., para. (4).

[149] Ibid.

[150] Ibid.

[151] *North Sea Continental Shelf* (note 103 above). See also draft conclusion 11 of the draft conclusions on identification of customary international law (A/71/10, chap. V, sect. C).

[152] *North Sea Continental Shelf* (note 103 above), para. 61.

of a treaty rule can help crystallize an emerging general rule of international law,[153] or that a treaty rule can, after adoption, come to reflect a general rule on the basis of subsequent practice.[154] Perhaps the best example of a treaty embodying a norm of general international law that meets the criteria for *jus cogens* is what the Commission referred to as "the law of the Charter concerning the prohibition of the use of force".[155] While the basic norm is found in a treaty, the Charter of the United Nations, it is also a norm of general international law, in the form of customary international law.

57. Judicial practice has reflected the role of treaty rules for the identification of norms of jus cogens in similar ways. Famously in the *Belgium v. Senegal* case, the International Court of Justice based its conclusion that the prohibition of torture is a norm of *jus cogens* on its customary status and not its conventional status.[156] The decisions of the International Tribunal for the Former Yugoslavia in relation to torture and genocide have been particularly instructive in this regard. In *Furundžija*, the Tribunal, after recognizing that torture is prohibited by human rights treaties,[157] proceeds to determine the *jus cogens* status of the prohibition on the basis of customary international law.[158] This approach is most clearly evident in *Prosecutor v. Tolimir*, where the Tribunal, having recognized that genocide is prohibited by the Genocide Convention, identifies the prohibition as a *jus cogens* on the basis, not of the conventional rule, but of the customary international law rule.[159] The Inter-American Court of Human Rights has similarly determined the prohibition in

[153] Ibid., paras. 61-69.

[154] Ibid., paras. 70-74. See also *Federal Republic of Germany v. Margellos and Others*, Petition for Cassation, Judgment of 17 September 2002, Special Supreme Court Case No. 6/2002, para. 14. ("the provisions contained in the [...] Hague Regulations attached to the Hague Convention IV of 1907 have become customary rules of international law (*jus cogens*)".

[155] See para. (1) of the commentary to draft article 50 (note 80 above). This language was also repeated in the *Military and Paramilitary Activities* case (note 72 above), p. 190. See also Alfred Verdross, "*Jus dispositivum* and *jus cogens* in international law", *American Journal of International Law*, vol. 60, p. 59; Jochen A. Frowein, "Ius cogens", in Rudiger Wolfrum, ed., *Max Planck Encyclopaedia of Public International Law*, online edition (2012); Jordan Paust, "The reality of *jus cogens*", *Connecticut Journal of International Law*, vol. 7, pp. 82 and 83 ("*Jus cogens* is a form of customary international law. It may be reflected also in treaties but, as a custom, its birth, growth, other change and death, depend on the patterns of expectation and behaviour that are recognizably generally conjoined in the ongoing social process."). See also statement by Mr. Ago, summary records, 828th meeting, in *Yearbook of the International Law Commission 1966*, vol. I (Part I) (United Nations publication, Sales No. 67.V.1), para. 15 ("Even if a rule of *jus cogens* originated in a treaty, it was not from the treaty as such that it derived its character but from the fact that, even though derived from the treaty [...], it was already a rule of general international law").

[156] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (note 94 above), para. 99.

[157] *Furundžija* (note 45 above), para. 144.

[158] Ibid., para. 153.

[159] *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, T.Ch.II, 12 December 2012, para. 733 ("These provisions of the Genocide Convention are widely accepted as customary international law rising to the level of *jus cogens*."). See also *Jelisić* (note 113 above), para. 60. See further *Prosecutor v. Radovan Karadžić*, Judgement, Case No. IT-95-5/18-T, 24 March 2016, para. 539.

common article 3 of the Geneva Conventions to be *jus cogens* on the basis of its customary status.[160]

58. This trend of determining the existence of a *jus cogens* norm on the basis of customary international law when the norm in question also exists in treaty law, is also conspicuous in State practice, including domestic decisions. In *Siderman*, for example, while torture is prohibited under the Convention against Torture, the Court describes *jus cogens* as an "elite subset of the norms recognized as customary international law."[161] The notion that treaty rules, even if themselves not constituting norms of general international law, can still reflect or embody such norms, which may then be elevated to the status of *jus cogens*, is also captured in scholarly writings.[162] The approach identified in the present report is also supported by findings of international non-judicial monitoring bodies which refer to, inter alia, national practice. The Working Group on Arbitrary Detention, for example, found that the prohibition of all forms of arbitrary deprivation of liberty constituted both "customary international law and a peremptory norm (*jus cogens*)", but it also concluded that the prohibition of arbitrary detention "appears in numerous international instruments of universal application and has been introduced into the domestic law of almost all States. Lastly, arbitrary detention is regularly denounced within national and international forums".[163] In *Belhaj and another v. Straw and others*, Lord Sumption of the United Kingdom Supreme Court (with whom Lord Hughes concurred) agreed with the Working Group on the identification of the above-mentioned *jus cogens* norm,[164] and by invoking the principles contained in

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[160] Inter-American Court of Human Rights, *"Las Dos Erres" Massacre v. Guatemala*, Judgment of 24 November 2009, concurring opinion of Ramón Cadena Rámila, Judge ad hoc ("At the time when the events of the instant case occurred, the prohibition established in common Article 3 to the Geneva Conventions was already part of the customary international law, and even of the *jus cogens* domain").

[161] *Siderman de Blake v. Republic of Argentina* (note 48 above), para. 715. For other examples where the customary international law prohibition of torture is advanced as the basis for the *jus cogens* norm, instead of the treaty law prohibition, see the following among many others: *R v. Bow Street Metropolitan Stipendiary Magistrate (Pinochet)* (note 67 above); *Al-Adsani v. United Kingdom* (note 45 above), para. 30; *Kazemi v. Islamic Republic of Iran* (note 50 above), paras. 151 and 152.

[162] Weatherall (note 87 above), p. 125 ("Treaty law is representative of *jus dispositivum* against which *jus cogens* is juxtaposed, and whatever role treaties may play in the crystallization of peremptory norms, they are not themselves the formal source of peremptory norms"); See also Alexander Orakhelashvili, "Audience and authority — the merit of the doctrine of *jus cogens*", in *Netherlands Yearbook of International Law 2015*, p. 124 ("The *Nicaragua* case has sorted this analytical dilemma three decades ago ... The International Court of Justice chose to speak of customary rules made via concerted and collective expression of positions of dozens, even hundreds, of states, manifested through their participation in [*inter alia*] multilateral treaties ..."); Criddle and Fox-Decent (note 146 above), p. 341. See also Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (New York, Cambridge University Press, 2009), pp. 401-402, suggesting that the principle of non-retroactivity of crimes and punishment as a *jus cogens* norm (or at least an emerging *jus cogens* norm), in addition to its customary international law status, is repeatedly recognized "in near universal treaty law", adopted "as a matter of domestic law by so many states" and faces no "opposition ... in modern times".

[163] See report of the United Nations Working Group on Arbitrary Detention on the right of anyone deprived of their liberty to bring proceedings before a court (A/HRC/30/37), para. 11.

[164] *Belhaj and Another v. Straw and Others*, [2017] UKSC 3, Judgment of 17 January 2017, para. 271.

article 9 of the International Covenant on Civil and Political Rights, found an almost complete consensus on an irreducible core of the international obligation under which "detention is unlawful if it is without any legal basis or recourse to the courts".[165]

59. Thus, while treaty provisions do not, as such, constitute norms of general international law capable of forming the basis for *jus cogens* norms, they can reflect rules of general international law which can reach the status of *jus cogens*.

C. Second criterion: recognition and acceptance

60. In the first report on the topic of *jus cogens*, the Special Rapporteur stated that the majority of rules of international law fall into the category of *jus dispositivum* and can be amended, derogated from and even abrogated by consensual acts of States.[166] This applies not only to treaty rules, but also to norms of general international law. While the Commission was not in a position to approve language recognizing, expressly, the distinction between *jus dispositivum* and *jus cogens*, the Special Rapporteur is of the opinion that it is an important conceptual distinction with strong support in practice and academics writings,[167] which will hopefully be reconsidered by the Commission. But the distinction is also significant because it

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[165] Ibid., para. 270 ("The consensus on that point is reflected in the terms of the [International Covenant on Civil and Political Rights, which] ... has been ratified by 167 states to date ... Malaysia is one of a handful of states which are not party, but it has declared that it adheres to its principles").

[166] A/CN.4/693, paras. 64 and 65.

[167] See *North Sea Continental Shelf* (note 103 above), para. 72 ("Without attempting to enter into, still less pronounce upon any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties."); dissenting opinion of Judge Tanaka in the *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment, I.C.J. Reports 1966*, p. 6, at p. 298 ("*jus cogens*, recently examined by the International Law Commission, [is] a kind of imperative law which constitutes the contrast to the *jus dispositivum*, capable of being changed by way of agreement between States") and separate opinion of Judge Shahabuddeen in the *Case concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)* (www.icj-cij.org/docket/files/78/6759.pdf), para. 135 ("States are entitled by agreement to derogate from rules of international law other than *jus cogens*"). See also separate opinion of Judge ad hoc Torres Bernárdez in the *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay* (www.icj-cij.org/docket/files/135/15891.pdf), para. 43 ("As the rules laid out in Articles 7 to 12 of the Statute of the River Uruguay are not peremptory norms (*jus cogens*), there is nothing to prevent the Parties from deciding by 'joint agreement to'"). For literature, see Verdross (note 155 above), p. 60 ("There was clearly consensus in the Commission that the majority of the norms of general international law do not have the character of *jus cogens*"); Christian Tomuschat, "The Security Council and *jus cogens*", in Enzo Cannizzaro, ed., *The Present and Future of Jus Cogens* (Rome, 2015), p. 19 ("Most of the rules of international law are *jus dispostivum*"); Merlin M. Magallona, "The concept of *jus cogens* in the Vienna Convention on the Law of the Treaties", *Philippine Law Journal*, vol. 51, No. 5, p. 521 ("*jus dispositivum* rules which can be derogated by private contracts"); Aldana Rohr, *La responsabilidad internacional del Estado por violación al jus cogens* (Buenos Aires, 2015), p. 5 ("por un lado, aquellas de naturaleza dispositiva — *jus dispositivum* —, las más numerosas, creadas por acuerdo de voluntades, derogables también por acuerdos de voluntades" [most of the rules [of international law] have a dispositive character — *jus dispostivum* —, created by an agreement of wills, which can also be derogated by an agreement of wills]).

serves to confirm that not all "norms of general international law" are *jus cogens*. The majority of these norms — norms of general international law — are *jus dispositivum*. Norms of general international law have the *potential* to become norms of *jus cogens*. To become norms of *jus cogens* additional requirements, spelled out in article 53 of the Vienna Convention, must be met.

61. Before addressing the requirements for the elevation of a norm of general international law to *jus cogens* status, it is necessary to address a preliminary question of sequence. The structure of article 53 — a norm of *jus cogens* is a norm of general international law which is accepted and recognized by the international community as one from which no derogation is permitted — suggests that what comes first, both in terms of formation of the norm and in terms of its identification, is to be a norm of general international law. Once a norm meets the test of being a norm of general international law, the next step is to show that such a norm meets the acceptance and recognition requirement. Purportedly based on *Nicaragua*, Alexander Orakhelashvili's analysis seems to suggest that the "norm of general international law" requirement can be proven after the determination that the norm in question is a norm of *jus cogens*.[168] However, this sequence does not follow. Apart from the divergence of opinion as to whether *Nicaragua* recognized the prohibition on the use of force as *jus cogens*,[169] it is not clear what the purpose of determining the customary nature of a norm would be once it is established that it is a norm of *jus cogens*.

62. This does not mean that a court will *always* have to methodically show the sequencing of its determination that a norm constitutes a norm of *jus cogens*. But it is nonetheless important, in the identification of a norm as *jus cogens*, to be aware of the structure of article 53 and the consequent requirements.

63. Article 53 states that, to qualify as a norm of *jus cogens*, a norm of general international law must also be one that is "accepted and recognized by the international community of States as a whole as one from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". As explained above, this is a composite requirement. The requirement is one of acceptance and recognition. But this requirement of "acceptance and recognition" is made up of other elements, namely (a) "international community of States as a whole" and (b) "from which no derogation is permitted". The elements describe different aspects concerning the acceptance and recognition referred to in article 53. They describe who must accept and recognize and what must be accepted and recognized.

64. As previously suggested, it is not required to show that the norm in question is "one from which no derogation is permitted", nor is it required to show that the norm in question "may be modified only by a norm of general international law having the same character". Without prejudging the contents and conclusions of future reports, the former is a consequence of *jus cogens* norms, while the latter describes how the *jus cogens* norms may be modified. For the purposes of the

[168] Orakhelashvili (note 126 above), pp. 119-120 ("once a norm is part of *jus cogens*, its customary status can be proved by criteria different from those applicable to other norms ...").

[169] See the first report of the Special Rapporteur on *jus cogens* (A/CN.4/693), para. 46. See, for discussion, James A. Green, "Questioning the peremptory status of the prohibition of the use of force", *Michigan Journal of International Law*, vol. 32, No. 2.

present report, and in particular the criteria for *jus cogens*, these elements show what the international community of States as a whole should be shown to have "accepted and recognized".

65. As stated above, it is the "international community of States as a whole" that must accept and recognize the *jus cogens* character of a norm. It is worth recalling that the Commission itself, when adopting draft article 50, had not included the element of recognition and acceptance by the international community of States a whole, stating only that a norm of *jus cogens* is one "from which no derogation is permitted."[170] However, even during the deliberations of the Commission, the link between norms of *jus cogens* and the acceptance of the "international community of States" had been expressed by various members of the Commission.[171]

66. The proposal of the United States to amend the Commission's text (draft article 50) so that *jus cogens* norms were qualified as those norms that were "recognized in common by the national and regional legal systems of the world"[172] was purportedly inspired by the objective to ensure that the peremptory character of the norm in question was "endorsed by the international community as a whole."[173] While the United States proposal was rejected for, inter alia, fear that it implied the subordination of *jus cogens* norms to domestic law,[174] the idea of acceptance and recognition by the international community was widely accepted by the Vienna Conference. The proposal of Finland, Greece and Spain, which was more direct on that point, described *jus cogens* norms simply as those norms "recognized by the international community" from which no derogation was permitted.[175]

67. It was on the basis of the joint proposal of Finland, Greece and Spain that the Vienna Conference adopted the formulation in article 53.[176] The Drafting Committee, for its part, inserted the word "accepted" in that proposal, so that the international community "accepted and recognized" the non-derogability of that particular norm.[177] According to the Chairman of the Drafting Committee, this was done because Article 38 of the Statute of the International Court of Justice includes both the words "recognized" and "accepted"[178] — "recognized" was used in

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[170] See article 50 of the Draft Articles on the Law of Treaties (note 80 above).

[171] See statement by Mr. Luna, note 129 above, para. 34 ("[*jus cogens*] was positive law created by States, not as individuals but as organs of the international community ...").

[172] See note 132 above.

[173] See statement of the United States (note 133 above), para. 17.

[174] See statement by Cuba, fifty-second meeting, in the *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968: Summary Records of the Plenary Meetings and Meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7); statement by Poland, fifty-third meeting, para. 41; and statement by Uruguay, fifty-third meeting, para. 51, suggesting that while the United States proposal was intended to signify recognition, the idea was "not, perhaps, expressed as well as it might have been".

[175] See *Official Records of the United Nations Conference on the Law of Treaties* (note 132 above), p. 174. See also the statement by Uruguay, *Official Records of the United Nations Conference on the Law of Treaties, First Session* (note 91 above), fifty-third meeting para. 52, to the effect that the Finnish, Greek and Spanish proposal captured the intention behind the United States proposal.

[176] See the statement by Mr. Yaseen, Chairman of the Drafting Committee, ibid., eightieth meeting, para. 4.

[177] Ibid.

[178] Ibid.

connection with convention and treaties and general principles of law, while accepted was used in connection with customary international law. The phrase, "as a whole" was inserted by the Drafting Committee "to indicate that no individual State should have the right of veto" with respect to the recognition of a norm as *jus cogens*.[179] The Chairman of the Drafting Committee explained that the insertion of the words "as a whole" was meant to indicate that it was not necessary for the peremptory nature of the norm in question "to be accepted and recognized by all States" and that it would be sufficient if "a very large majority did so".[180] The phrase "as a whole" indicates that it is not States individually, but rather States as a collective, that are required to accept and recognize the non-derogability of the norm in question. Even within the Commission, some members seemed to understand *jus cogens* as requiring collective acceptance.[181]

68. What is not explained in the *travaux préparatoires* is how the Drafting Committee arrived at the insertion of "States" to make it "international community of States as a whole". Within the Commission, some members understood "international community" as referring to the international community of States, while others understood it as being broader than just the community of States.[182] It is clear, however, that, even without the addition of the words "of States", delegates at the Vienna Conference interpreted "international community as a whole" to mean "international community of States as whole".[183] The United States, for example, explaining the purport of its proposal, referred to the recognition of the "international community as a whole" but equated this with the "voice" that "individual States and groups of States" should have in "formulating *jus cogens* norms."[184] Similarly, Cyprus, having expressed the view that *jus cogens* was intended to protect the interest of the international community as a whole,

[179] Ibid., para. 7.

[180] Ibid. para. 12. See also de Wet and Vidmar (note 89 above), p. 543 ("This threshold for gaining peremptory status is high, for although it does not require consensus among all states ... it does require the acceptance of a large majority of states."). See further Christófolo (note 107 above), p. 125 ("[reflects] the consent of an overwhelming majority of States. Neither one State nor a very small number of States can obstruct the formative process of peremptory norms.").

[181] See statement of Mr. de Luna (note 129 above), para. 34, stating that *jus cogens* "was positive law created by States, not as individuals but as organs of the international community".

[182] As an example of a broader reading of "international community", see statement of Mr. Verdross in *Yearbook of the International Law Commission 1966* (note 129 above), 828th meeting, para. 9 ("there were some rules of international law that related to the interests of the international community, *in other words, to those of all mankind.*"). For an example of a narrower reading, see the statement of Mr. de Luna (note 129 above), at para. 34, stating that *jus cogens* "was positive law created by States, not as individuals but as organs of the international community".

[183] For an interesting account of the concept of the "international community see E.A. Karakulian, "The idea of the international community in the history of international law", *Jus Gentium: Journal of International Legal History*, vol. 2, No. 1, especially p. 590, where the author argues that the idea, initially, was meant to suggest "a certain commonality of the human species" but gradually "acquired an inter-State character, and the presumed general human community remained within the framework of erudition or classical formation, losing its legal dimension".

[184] See statement by the United States (note 133 above), para. 17.

proceeded to stress that the "smaller States had an even greater interest than the larger ones in the adoption" of the rule.[185]

69. The issue of whether the language of article 53 should *now* be read to mean "international community as a whole", so that it includes entities other than States, like international organizations, non-governmental organizations and perhaps even individuals, in the creation of *jus cogens* norms has come up recently. In its statement during the Sixth Committee's consideration of the report of the Commission, Canada, while stressing the need for any definition of *jus cogens* not to deviate from article 53, nonetheless stated that "it would be beneficial for the Commission ... to enlarge the idea of the acceptance and recognition of peremptory norms to include other entities, such as international and non-governmental organizations".[186] Indeed, in the context of the draft articles on the law of treaties between States and international organizations or between two or more international organizations, the Commission considered using the phrase "international community as a whole".[187] However, on reflection, the Commission decided that "in the present state of international law, it is States that are called upon to establish or recognize peremptory norms".[188]

70. The International Court of Justice, likewise, in *Questions Relating to the Obligation to Prosecute or Extradite*, determined the *jus cogens* character of the prohibition of torture on the basis of State-developed instruments.[189] The International Criminal Court has also stated that *jus cogens* requires recognition by States.[190] Domestic courts have similarly continued to link the establishment of *jus*

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[185] See statement by Cyprus, *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968: Summary Records of the Plenary Meetings and Meetings of the Committee of the Whole* (United Nations publications, Sales No. E.68.V.7), fifty-third meeting, para. 67.

[186] A/C.6/71/SR.27, para. 9. See also the statement of Mr. Petrič during the Commission's debate on *jus cogens* in 2016 (A/CN.4/SR.3322, p. 3: ("*M. Petrič souscrit à l'analyse et aux conclusions du Rapporteur spécial au sujet de la controverse concernant le rôle du consentement dans la formation du* jus cogens *et ajoute que le consentement de la communauté internationale des États dans son ensemble renvoie ipso facto au consentement de la société des hommes, car l'un ne saurait aller sans l'autre.*" ["Mr. Petrič endorsed the Special Rapporteur's analysis and conclusions on the controversy over the role of consent in the formation of *jus cogens* and added that the consent of the international community of States as a whole referred *ipso facto* to the consent of the mankind, for one cannot go without the other."]).

[187] See para. (3) of the commentary to draft article 53 of the Draft Articles on the Law of Treaties between States and international organizations or between international organization, with commentaries, *Yearbook of the International Law Commission, 1982*, vol. II, Part Two (United Nations publication, Sales No. E.83.V.3 (Part II)).

[188] Ibid.

[189] *Questions Relating to the Obligation to Prosecute or Extradite* (note 94 above), para. 99. The Court cites, among others, the Universal Declaration of Human Rights, the Geneva Conventions for the Protection of War Victims, the International Covenant on Civil and Political Rights, General Assembly resolution 3452 (XXX) and domestic legislation.

[190] *The Prosecutor v. Germain Katanga* (ICC-01/04-01/07-34-05-tENg), Decision on the application for the interim release of detained witnesses, Trial Chamber II, 1 October 2013 ("peremptoriness [of the principle of non-refoulement] finds increasing recognition among States").

cogens norms with State recognition.[191] While *jus cogens* continues to be linked to notions of the conscience of mankind in practice and scholarly writings,[192] the material advanced to illustrate recognition of norms as *jus cogens* remain State-developed materials, such as treaties and General Assembly resolutions.

71. In its consideration of the topics of identification of customary international law and subsequent agreements and subsequent practice in relation to treaty interpretation, the Commission has also grappled with the role of non-State actors. With respect to practice in the formation and expression of customary international law, the Commission determined that it is "primarily the practice of States" that is relevant.[193] The use of the adverb "primarily" was intended to emphasize that, in some instances, the practice of international organizations may also contribute to customary international law.[194] The practice, or "conduct", of non-State actors such as non-governmental organizations does not contribute to the formation or expression of customary international law, but "may be relevant when assessing the practice".[195] Similarly, in the context of subsequent agreements and subsequent practice, the Commission determined that while the practice of non-State actors does not amount to subsequent practice for the purposes of treaty interpretation, it "may be relevant when assessing the subsequent practice of parties to a treaty".[196]

72. In the same vein, while it is the recognition and acceptance of States that is relevant for the identification of a norm as *jus cogens*, the practice of non-State actors is not irrelevant. It may lead to recognition and acceptance by States of the peremptoriness of the norm, or may contribute to assessing such recognition and acceptance. But it remains, nonetheless, the acceptance and recognition of "the international community of States as a whole" that is relevant.

73. In order for a norm of general international law to acquire the status of *jus cogens* it has to be recognized by the "international community of States as a whole" as having a particular quality, namely that it may not be derogated from. As

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[191] See, for example, *Buell v. Mitchell* (note 94 above), para. 102 ("recognized by the international community of States as a whole"); *Bouzari et al v. Islamic Republic of Iran* (note 89 above), para. 49; *On the Application of Universal Recognized Principles and Norms of International Law and of International Treaties of the Russian Federation by Courts of General Jurisdiction* (note 50 above); and *Arancibia Clavel* (note 53 above), para. 29.

[192] *Croatia v. Serbia*, judgment of 3 February 2015 (note 43 above), para. 87, quoting *Bosnia and Herzegovina v. Serbia and Montenegro* (note 42 above); Antônio Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium (I)* (Leiden, The Netherlands, Martinus Nijhoff Publishers, 2010), p. 316 ("It is my view that there is, in the multicultural world of our times, an irreducible minimum, which, in so far as international law-making is concerned, rests on its ultimate material source: human conscience.")

[193] See draft conclusion 4, paragraph 1, of the draft conclusions on identification of customary international law (note 151 above).

[194] Ibid., para. 2 of draft conclusion 4. See also para. (2) of the commentary to draft conclusion 4.

[195] Ibid., para. 3 of draft conclusion 4.

[196] A/71/10, draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, para. 2 of draft conclusion 5.

explained above, non-derogation is itself not a criterion for *jus cogens* status.[197] Rather, the acceptance and recognition that the norm has that quality constitutes the criterion for *jus cogens*. On its own, non-derogation is the primary consequence of peremptoriness[198] and will be addressed in the third report of the Special Rapporteur (2018). This consequence is what distinguishes *jus cogens* norms from the majority of other norms of international law, namely *jus dispositivum*.[199]

74. While a more detailed analysis of non-derogation will be provided in a subsequent report, for the purposes of the present report it is sufficient to state that "the international community of States as whole" must accept and recognize that the norm in question is one from which no derogation is permitted. In other words, the international community of States as a whole accepts and recognizes that rules and other norms of *jus dispositivum* that are inconsistent with the candidate norm in question are invalid. In particular, any special or subsequent norm of *jus dispositivum* will not take priority over the norm in question and will be invalid if inconsistent with it.[200] The criterion, then, is that the international community of States as a whole accepts and recognizes that, in contrast to other general norms of international law, the norm in question will remain universally applicable and not

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[197] See, for a contrary view, Orakhelashvili (note 162 above), p. 119, who suggests that non-derogability determines "which rules falls within the category of *jus cogens*". In his view, non-derogability implies "non-bilateralisable". However, interesting though this theory may be, it is but a theory and one not supported by any authority in practice. See also Kleinlein (note 126 above), at 192. See however, Knuchel (note 84 above), note 65 ("[A norm's] acceptance and recognition by the international community of States as a whole as a norm from which no derogation is permitted is determinative of its acquisition of peremptory character"). This does not mean, however, that the content of the norm is irrelevant. See *Legality of the Threat or Use of Nuclear Weapons* (note 83 above), para. 83 ("question whether a norm is part of jus cogens relates to the legal character of the norm").

[198] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, *ICJ Reports 2012*, p. 99, at para. 95 ("A *jus cogens* rule is one from which no derogation is permitted."); Kolb (note 55 above), at 2 ("The key term for the classical formulation of *jus cogens* is therefore 'non-derogability'. In other words, *jus cogens* is defined by a particular quality of the norm at stake, that is, the legal fact that it does not allow derogation"). Knuchel (note 84 above), at 60 ("derogability is the presumptive feature of international norms"); Christófolo (note 107 above), at 125 ("The non-derogable aspect of peremptory norms is a non-dissociable feature, perhaps the most important one, in the definition of *ius cogens*."); Cathryn Costello and Michelle Foster, "Non-refoulement as custom and *jus cogens*? Putting the prohibition to the test", in Maarten den Heijer and Harmen van der Wilt, eds., *Netherlands Yearbook of International Law 2015* (The Hague, The Netherlands, T.M.C. Asser Press, 2015), p. 280 ("While non-derogability is the defining feature of jus cogens, it is a necessary but insufficient one").

[199] *North Sea Continental Shelf cases* (note 103 above) para. 72 ("Without attempting to enter into, still less pronounce upon any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from, in particular cases, or as between particular parties."). For a more explicit recognition of the distinction between *jus cogens* and *jus dispositivum*, see dissenting opinion of Judge Tanaka in the South West Africa cases (note 167), p. 298 ("*jus cogens*, recently examined by the International Law Commission, [is] a kind of imperative law which constitutes the contrast to the *jus dispositivum*, capable of being changed by way of agreement between States").

[200] Christófolo (note 107 above), pp. 125-126. See also Knuchel (note 84 above), p. 60.

subject to fragmentation.[201] In other words, it is, as a matter of law, not possible "to repeal or abrogate, to destroy and impair the force and effect of, to lessen the extent of authority ..." of the norm.[202]

75. A treaty provision prohibiting the conclusion of a treaty derogating from or modifying the former treaty in the sense of article 41 of the Vienna Convention is not necessarily a norm of *jus cogens*.[203] Such a provision would not be a norm of general international law and would operate only *inter partes*. Thus other States not party to the said treaty could validly conclude a treaty prohibited by the former treaty. Moreover, the consequences for a treaty in violation of such a clause will not necessarily be invalidity but will be subject to other rules of international law, including the rules of the treaty itself.[204] Though not itself a norm of *jus cogens*, such a provision may reflect such a norm. Moreover, for the purposes of the criteria, any such provision may be useful as evidence concerning a norm which may not be derogated from.

76. The above analysis explains whose acceptance and recognition is required and what must be accepted and recognized. But it does not explain how that acceptance and recognition is to be shown. It is the acceptance and recognition that is at the heart of the elevation of a norm to *jus cogens* status. The element of acceptance and recognition is the most important of the criteria for the identification of *jus cogens* norms of international law. While the content of the norms, and the values such norms serve to protect, are the underlying reasons for the norm's peremptoriness, what identifies them as *jus cogens* norms is the acceptance and recognition of such status by the international community of States as a whole.[205]

77. Jure Vidmar and Erika de Wet have suggested that the requirement for acceptance and recognition implies "double acceptance" since such a norm would first have to be accepted as a "normal" norm of international law and then as a

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[201] Orakhelashvili (note 162 above), p. 118 ("A Jus cogens norm is therefore ... meant to operate uniformly in relation to all members of [the international] community. Non-derogability means the legal impossibility of opting out from the substantive scope of the rule or from the peremptory effect of the same rule, reinforcing the requirement of the continuing uniformity in the application of the relevant norm ..."). See also Weatherall (note 87 above), p. 86 ("This legal effect of *jus cogens* reflects the resistance of peremptory norms to modification or repeal by the particular will of individual States.")

[202] Orakhelashvili (note 126 above), p. 73.

[203] Article 41 para. 1 of the Vienna Convention on the Law of Treaties provides that "[t]wo or more parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if ... (b) the modification of the treaty is not prohibited by the treaty".

[204] See, for discussion, Daniel G. Costelloe, *Legal Consequences of Peremptory Norms in International Law* (unpublished doctoral thesis, 2013), p. 27 ("Articles 41(1) and 58(1) of the Vienna Convention suggest that an attempted modification or suspension of a treaty not in conformity with the respective provision would be without effect, yet the exact consequences remain unspecified and untested. Since these provisions do not fall under Part V, Section 2 of the Vienna Convention (Invalidity of Treaties) the consequences of such *inter se* agreements would not necessarily produce the consequences of invalidity").

[205] See also Knuchel (note 84 above), p. 66.

peremptory norm of international law.[206] This characterization is correct, as long as it is understood that the "first" and "second" acceptance are qualitatively different from each other. In the first acceptance, the norm is accepted as a norm of international law, either through "acceptance as law" (*opinio iuris sive necessitatis*) for customary international law or recognition "by civilized nations" for general principles of law. The second acceptance is the acceptance of the special qualities of that norm of general norm of international law, namely its non-derogability.[207] This latter acceptance has been referred to as *opinio juris cogentis*.[208] More importantly, consistent with the discussion above concerning the implications of the phrase "as a whole", this double acceptance does not require the "acceptance" or "consent" of States individually, but, rather, requires that the international community of States as a whole, or collectively, embrace the non-derogability of the norm in question.[209]

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[206] de Wet (note 89 above), p. 542 ("The international community of states as a whole would therefore subject a peremptory norm to 'double acceptance'"); Vidmar (note 89 above), p. 25 ("A peremptory norm may be said to be subject of to a "double acceptance" by the international community of States as a whole: the acceptance of the content of the norm, and the acceptance of the its special, i.e. peremptory, character.")

[207] See, for discussion, Vidmar (note 89 above), p. 26. See also Costello and Foster (note 198 above), p. 10 ("to be *jus cogens*, a norm must meet the normal requirements for customary international law … and furthermore have that additional widespread endorsement as to its non-derogability."); Asif Hameed, "Unravelling the mystery of *jus cogens* in international law", (2014) 84 *British Yearbook of International Law* 52, p. 62. See further Gordon A. Christenson "*Jus Cogens*: Guarding Interests Fundamental to International Society" (1987-1988) 28 *Virginia Journal of International Law* 585, at 593 ("The evidence would also need to demonstrate requisite *opinio juris* that the obligation is peremptory, by showing acceptance of the norm's overriding quality"); *Committee of United States Citizens Living in Nicaragua* (note 114 above), ("… in order for such a customary norm of international law to become a peremptory norm, there must be a further recognition by "the international community … as a whole" [that it is] a norm from which no derogation is permitted.").

[208] Kerstin Bartsch and Björn Elberling, "*Jus Cogens* vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in *Kalageropoulou et al v. Greece and Germany* Decision" (2003) 4 *German Law Journal* 477, p. 485 ("As can be derived from Art. 53 of the Vienna Convention …, the evolution of a *jus cogens* rule ….presupposes, apart from the elements of state practice and *opinio juris*, the conviction of the large majority of states that the rule concerned is of fundamental importance and may thus not be derogated from (*opinio juris cogentis*)."). See, pertinently, Kadelbach (note 84 above), p. 167 ("Most proposals take an intermediate route. Still, practice and *opinio juris* is required with respect to the recognition of the rule itself. However, the non-derogatory character, the *opinio juris cogentis*, can accordingly, be ascertained by criteria found in treaty law.").

[209] See, for example, Alain Pellet "The normative dilemma: will and consent in international law-making" (1992) 12 *Australian Yearbook of International Law* 22, p. 38, stating that the requirement in article 53 for acceptance and recognition of the international community as a whole "excludes a State by State acceptance or even recognition".

78. While this approach is generally accepted,[210] the important question is how the acceptance and recognition of non-derogability — *opinio juris cogentis* — is to be shown. This question itself raises two issues. First, what materials may be advanced to show that a norm has acquired peremptory status? Second, what should be the content of the relevant materials?

79. With regard to the nature of the materials that may be used to show acceptance and recognition, it is worth recalling that the phrase "international community of States as a whole" implies that it is the "acceptance and recognition" of States that is at issue. As such, it is materials that are capable of expressing the views of States that are relevant. In particular, this means materials developed, adopted and/or endorsed by States. Materials emanating from other sources may well be relevant, but as a subsidiary source and as a means of assessing materials reflecting the views of States.

80. The approach of the International Court of Justice in *Questions Relating to the Obligation to Prosecute or Extradite* may offer some valuable lessons with respect to the criteria for *jus cogens* norms. First, consistent with the general approach described above, the Court identifies the prohibition of torture as "part of customary international law" and then notes that it "has become a peremptory norm (*jus cogens*)".[211] In what follows, the Court describes the materials on which it concludes there is *opinio juris*.[212] The list includes treaties and resolutions, as well as references to legislation:

> "The prohibition is grounded in a widespread international practice and on the *opinion juris* of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the Protection of War Victims; the International Covenant on Civil and Political Rights of 1966; General Assembly resolution 3452 (XXX) of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally acts of torture are regularly denounced within national and international fora."[213]

81. The Court is not explicit about whether it is here describing *opinio juris cogentis* or merely *opinio juris sive necessitatis*. It is even possible that the Court

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[210] See, for example, statement of Ireland, A/C.6/71/SR.27, para. 20. See also Linderfalk (note 84 above), especially pp. 65-69, discussing different, non-mainstream, approaches. Positivists, he suggests, argue that, for there to be a general practice, "states do not generally derogate from a rule of law .. and they generally do not modify [the rule] by means of ordinary international law. Secondly there has to be an *opinio iuris generalis*: states widely subscribe to the opinion that, by virtue of an authoritative set of customary rules … no derogation from [the rule] is permitted." Thus, in addition to the need to show the existence of a rule through the normal process, for positivists, it is also necessary to show that the no-derogation aspects meet the customary requirement of practice and *opinio iuris*.

[211] *Questions Relating to the Obligation to Prosecute or Extradite* (note 94 above), para. 99.

[212] Ibid.

[213] Ibid. This language approach was followed in the report of the United Nations Working Group on arbitrary detention (see note 163 above). It is worth observing that the sources referred to by the Court are similar to those referred to in *Filartiga v. Pena-Irala*, United States Court of Appeals (2nd Cir.), Judgment of 30 June 1980 (630 F.2d 876), pp. 7-11.

has conflated the two. It appears, however, that the Court views these as relevant materials for the establishment of acceptance and recognition of non-derogability. The reference to instruments of "universal application" — a core characteristic of *jus cogens* norms — suggests that the Court is concerned with the acceptance and recognition of the norms' peremptoriness. Alternatively, the Court implies that the materials relevant for assessing "normal" *opinio juris* are the same materials that are relevant for assessing whether the international community of States as a whole has accepted and recognized the peremptory nature of a norm.

82. While States and other actors of international law did not always clearly indicate the basis on which they believed particular norms had risen to the level of *jus cogens*,[214] the reliance on treaties and resolutions of international organizations as evidence of the acceptance and recognition of the non-derogability of norms is common and ought not to be controversial.[215] The view that treaties and resolutions of international organizations, particularly those of the United Nations, are relevant materials for finding the acceptance and recognition of non-derogability is also reflected in statements by States. This view is also consistent with the notion that it is the view of States that is determinative of the derogability.

83. While treaties and resolutions provide examples of materials for acceptability and recognition of non-derogation, these are not the only materials relevant for the identification of *jus cogens* norms. Any materials from which it can be shown that States collectively believe that a particular norm is one from which no derogation is permitted is relevant for the purposes of identification of *jus cogens* norms. As with *opinio juris sive necessitatis*, acceptance and recognition may be "reflected in a wide variety of forms".[216] Materials included in the non-exhaustive list of forms of evidence of *opinio juris* in draft conclusion 10 of the Commission's draft conclusions on identification of customary international law may also serve as evidence of acceptance and recognition of non-derogability.[217] Thus, in addition to treaty provisions and resolutions, public statements on behalf of States, official publications, governmental legal opinions, diplomatic correspondence and decisions

[214] See, for discussion, de Wet (note 89 above), p. 544.

[215] See, for example, *Bosnia and Herzegovina v. Serbia and Montenegro* (note 42 above), para. 161 and *Croatia v. Serbia*, judgment of 3 February 2015 (note 43 above), para. 87. See also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582, at para. 28, referring to the argument of Guinea that the right to a fair trial was *jus cogens* on the basis of, inter alia, a number of instruments; the separate opinion of Vice-President Ammoun in the advisory opinion of the International Court of Justice of 21 June 1971 on Namibia (www.icj-cij.org/docket/files/53/5601.pdf), at p. 79, relying on General Assembly and Security Council resolutions for the conclusion that the right to self-determination is a peremptory right; written observations submitted by the Government of the Solomon Islands to the International Court of Justice on the request by the World Health Organization for an advisory opinion on the legality of the threat or use of nuclear weapons (www.icj-cij.org/docket/files/95/8714.pdf), at para. 3.28 ("It is quite normal in international law for the most common and the most fundamental rules to be reaffirmed and repeatedly incorporated into treaties").

[216] Para. (2) of the commentary to draft conclusion 10 of the draft conclusions on identification of customary international law (note 151 above).

[217] Para. 2 of draft conclusion 10 of the draft conclusions on identification of customary international law (note 151 above) contains a list of examples of forms of evidence of *opinio juris*.

of national courts may also serve as evidence of acceptance and recognition.[218] It is, however, the content of these various forms of evidence that determines whether the evidence constitutes acceptance as law (for the purposes of customary international law) or acceptance and recognition of non-derogability (for the purposes of *jus cogens*).

84. Because it is the acceptance and recognition of States that is required to show that a norm is *jus cogens*, all the forms of materials listed above emanate from State processes. This does not mean, however, that sources from civil society, expert bodies and other sources may not be used to assess and give context to the State-made instruments. In *RM v. Attorney-General*, for example, the High Court of Kenya relied on Human Rights Committee general comment No. 18 (1989), on non-discrimination,[219] for a suggestion that non-discrimination is a peremptory norm of general international law.[220] Similarly, for its conclusion that the principle of non-refoulement was a norm of *jus cogens*, the International Criminal Court advanced, inter alia, the opinion of the United Nations High Commissioner for Refugees.[221] Similarly, the finding by the International Tribunal for the Former Yugoslavia in *Furundžija* that the prohibition of torture was a norm of *jus cogens* was based, inter alia, on the observations of the Inter-American Commission on Human Rights, the Human Rights Committee and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.[222] These "other" materials can, of course, not be evidence of acceptance and recognition. But they can provide a context for the primary forms of evidence and help to assess the primary materials.

85. Decisions of international courts and tribunals have also regularly been referred to in support of the proposition that a particular norm has reached the level of *jus cogens*. In *Prosecutor v. Popović*, the International Tribunal for the Former Yugoslavia quoted the statement of the International Court of Justice in *Bosnia and Herzegovina v. Serbia and Montenegro* (quoting *Democratic Republic of the Congo v. Rwanda*) to the effect that "the norm prohibiting genocide was assuredly a peremptory norm of international law (*jus cogens*)".[223] Although the International

[218] See, for example, *Prosecutor v. Furundžija* (note 45 above), para. 156, where the International Tribunal for the Former Yugoslavia referred to, among others, the following domestic court cases: *Siderman de Blake v. Argentina* (note 48 above); *Committee of United States Citizens Living in Nicaragua* (note 114 above); *Cabiri v. Assasie-Gyimah*, 921 F. Supp 1189, 1196 (SDNY 1996); *In re Estate Ferdinand E. Marcos*, 978 F.2d 493 (9th Cir.); *Marcos Manto v. Thajane*, 508 US 972, 125L Ed 2d 661, 113 S Ct. 2960.

[219] Human Rights Committee, general comment No. 18 on non-discrimination (see HRI/GEN/1/Rev.9 (Vol. I)), para. 1.

[220] *RM v. Attorney-General*, Judgment of the High Court of Kenya of 1 December 2006, eKLR [2006] eKLR, p. 18.

[221] See *Prosecutor v. Germain Katanga* (note 190 above), para. 30, referring to the 2007 advisory opinion of the Office of the United Nations High Commissioner for Refugees on the extraterritorial application of non-refoulement obligations. The Court also referred to several conclusions of the Executive Committee of the High Commissioner's Programme.

[222] See *Prosecutor v. Furundžija* (note 45 above), paras. 144 and 153. The Tribunal referred to the American Convention on Human Rights, general comment No. 24 of the Human Rights Committee and a report by the Special Rapporteur on Torture (E/CN.4/1986/15).

[223] *Prosecutor v. Popović et al.*, Judgement, Case No. IT-05-88-T, T.Ch.II, 10 June 2010, para. 807 (footnote 2910). For other references to judgments of the International Criminal Court relating to Bosnia and Herzegovina, see *Karadžić* (note 159 above), para. 539 (footnote 1714).

Court of Justice did not refer to *jus cogens* in the advisory opinion on *Reservations to the Genocide Convention*,[224] the advisory opinion has been cited on many occasions as support for the conclusion that the prohibition of genocide is a norm of *jus cogens*.[225] The statement of the International Court of Justice concerning the consequences of "intransgressible principles of international customary law" in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* has also been referred to in support of the conclusion that grave breaches of the Geneva Conventions constitute violations of *jus cogens* norms.[226] In *Prosecutor v. Furundžija*, for example, the Court's conclusion that the prohibition of torture was a norm of *jus cogens* was based, inter alia, on the extensiveness of the prohibition, including the fact that States are "prohibited from expelling, returning or extraditing" a person to a place where they may be subject to torture.[227] To demonstrate the extensiveness of this prohibition, the Court referred to judgments of, inter alia, the European Court of Human Rights.[228] The Special Tribunal for Lebanon in *Ayyash et al.* concluded that both the principles of legality[229] and fair trial[230] enjoy the status of *jus cogens*, and in *El Sayed* that the right to access justice has "acquired the status of peremptory norm (*jus cogens*)"[231] on the basis, inter alia, of the jurisprudence of national and international courts.

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[224] See, for discussion, the first report of the Special Rapporteur on *jus cogens* (A/CN.4/693), para. 54 (footnote 187), where the case is made that, while the International Court of Justice does not use the phrase *jus cogens* or peremptory norms, it describes the prohibition of genocide in terms that suggest peremptoriness.

[225] See, for example, *Prosecutor v. Karadžić* (note 159 above), para. 539; *Case 002, Decision on Ieng Sary's Appeal Against the Closing Order*, Extraordinary Chambers in the Courts of Cambodia, document No. D427/1/30 (30 April 2011), para. 244; *Democratic Republic of the Congo v. Rwanda* (note 83 above), para. 66; *Bosnia and Herzegovina v. Serbia* (note 42 above), p. 161; *Croatia v. Serbia* (note 43 above), para. 87.

[226] *Decision on Ieng Sary's Appeal Against the Closing Order* (note 225 above), para. 256; *Case 002/02, Decision on Evidence Obtained through Torture*, Extraordinary Chambers in the Courts of Cambodia, document No. 350/8 (5 February 2016), para. 25, where the court relied on, inter alia, *Questions Relating to the Obligation to Prosecute or Extradite* (note 94 above). Other international decisions referred to by the Extraordinary Chambers in the Courts of Cambodia in the *Decision on Evidence Obtained through Torture* include *Othman (Abu Qatada) v. United Kingdom*, Judgment of the European Court of Human Rights, Application No. 8139/09 and *Cabrera García and Montiel Flores v. Mexico*, Judgment of the Inter-American Court of Human Rights of 26 November 2010.

[227] *Prosecutor v. Furundžija* (note 45 above), para. 152.

[228] *Soering v. United Kingdom*, Judgment of the European Court of Human Rights, 7 July 1989; *Cruz Varas and Others v. Sweden*, Judgment of the European Court of Human Rights of 20 March 1991; and *Chahal v. United Kingdom*, Judgment of the European Court of Human Rights of 5 November 1996.

[229] *Prosecutor v. Ayyash et al* (STL-11-01/I), Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Appeals Chamber, 16 February 2011, para. 76, referring to the case of the International Tribunal for the Former Yugoslavia.

[230] *Prosecutor v. Ayyash et al* (STL-11-01/AC.AR90.1), Decision on Defence Appeals Against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", Appeals Chamber, 24 October 2012 (referring to the *Kadi* judgment in the European Court of Human Rights).

[231] *El Sayed* (CH/PRES/2010/01), Order assigning Matter to Pre-Trial Judge, President of the Special Tribunal of Lebanon, 15 April 2010, para. 29 (referring to judgments of the Inter-American Court of Human Rights).

86. The International Law Commission has also been referred to in assessing whether a particular norm has attained the status of *jus cogens*. Famously, in assessing the status of the prohibition of the use of force, the International Court of Justice observed that "the International Law Commission .... expressed the view that 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*'".[232] Most contributions that provide a list of generally accepted norms of *jus cogens* rely on the list provided by the Commission in the commentary to draft article 26 of the Articles on State Responsibility.[233] The Commission's own work may thus also contribute to the identification of norms of *jus cogens*. Scholarly writings may also be useful, as secondary material, in assessing and providing context to the primary forms of acceptance and recognition of peremptory status.[234]

87. It should be apparent that the materials referred to above are essentially the same materials that are also relevant for the identification of customary international law, i.e., they may be advanced as practice or evidence of *opinio iuris*. As described above, what separates the acceptance and recognition as a criterion for *jus cogens* and the potential uses of such materials for the purposes of the identification of customary international law is that, for the former, the materials must show a belief by the international community of States as a whole that the norm in question is one from which no derogation is permitted.[235] Provisions in treaties prohibiting reservations or withdrawal and providing for non-derogability, though not conclusive, would also be relevant for that purpose.

88. Whether the materials justify a conclusion that there is a belief by the international community of States as a whole that a norm is non-derogable is to be

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[232] *Military and Paramilitary Activities* (note 72 above), para. 190. See also *Re Víctor Raúl Pinto, Re, Pinto v. Relatives of Tomás Rojas*, Decision on Annulment of the Supreme Court of Chile 13 March 2007, Case No 3125-94, ILDC 1093 (CL 2007), paras. 29 and 31.

[233] Para. (5) of the commentary to draft article 26 of the Articles on State Responsibility (note 88 above). See den Heijer and van der Wilt (note 56 above), p. 9, referring to the norms in the list as those "beyond contestation"; Christófolo (note 107 above), p. 151; and Weatherall (note 87 above), p. 202. See also de Wet (note 89 above) p. 543. She relies, however, not on the Commission's list, but rather on the list included in the report of the Study Group of the Commission (note 88 above), with a list that was slightly modified from that of the Commission. For example, in the list she provides, "the right of self-defence" is included as a *jus cogens* norm its own right, while the list of the Commission contains the "prohibition of aggression" but not "self-defence" as an independent norm of *jus cogens*.

[234] See, for example, *Nguyen Thang Loi* (note 49 above), p. 108, relying on M. Cherif Bassiouni, "Crimes against humanity" in Roy Gutman and David Rieff, eds., *Crimes of War: What the Public Should Know* (Norton, 1999); *Prosecutor v. Kallon and Kamara: Decision on Challenge of Jurisdiction: Lomé Accord Amnesty* (SCSL-2004-15-AR72E and SCSL-2004-16-AR72E), 13 March 2004, para. 71, relying on Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge, 2004); *Bayan Muna* (note 52 above), citing M. Cherif Bassiouni, "International Crimes: *Jus cogens* and *obligatio erga omnes*" (1996) 59 *Law and Contemporary Problems* 63. See also *Siderman de Blake v. Argentina* (note 48 above), p. 718, citing several authors, including Karen Parker and Lyn Beth Neylon, "*jus cogens*: compelling the law of human rights" (1988/89) 12 *Hastings International and Comparative Law Review* 411 and Kenneth C Randal, "Universal jurisdiction under international law" (1988) 66 *Texas Law Review* 785, in support of the proposition that the prohibition of torture is a norm of *jus cogens*.

[235] See authorities cited in footnotes 207 and 208 above.

determined by examining all the materials in their context and according them the relevant weight. A number of factors may be relevant when assessing whether the available materials provide evidence of acceptance and recognition of a norm as *jus cogens*. Express reference in the materials to the non-derogability of a norm of general international law would be an important factor. It is also important that the materials, when considered as a whole, show a belief in the international community of States as a whole of non-derogability.

89. As described above, the characteristics of *jus cogens* identified in the first report of the Special Rapporteur and further expounded upon in the current report are not criteria for the identification of norms of *jus cogens*. They are, rather, descriptive elements that characterize the nature of *jus cogens*. It is therefore not necessary to show that a particular norm has the characteristics in order to qualify as a norm of *jus cogens*. Put differently, these descriptive elements are not additional requirements for *jus cogens* norms. In the light of the strong evidence described above, however, the belief by States that particular norms reflect these characteristics may be advanced in support of non-derogability. Thus, where the materials, when considered in their context and as a whole, show an acceptance and recognition by the international community of States as a whole that a norm of general international law protects or reflects the fundamental values of the international community, is hierarchically superior to other norms of international law and is universally applicable, this may be evidence that States believe such a norm to be non-derogable and, thus, a norm of *jus cogens*. The relevance of these characteristics, albeit only as indicative material, is related to the fact that, as noted by the International Court of Justice, whether a norm is a norm of *jus cogens* "relates to the legal character of the norm".[236]

IV. Proposals

A. Name of the topic

90. In the light of the debate in the Commission during the sixty-eighth session, the Special Rapporteur proposes that the Commission change the name of the topic from "*Jus cogens*" to "Peremptory norms of international law (*jus cogens*)".

B. Draft conclusions

91. On the basis of the analysis above, the Special Rapporteur proposes the following draft conclusions for consideration by the Commission.

Draft conclusion 4
Criteria for *jus cogens*

To identify a norm as one of *jus cogens*, it is necessary to show that the norm in question meets two criteria:

(a) It must be a norm of general international law; and

[236] See *Legality of the Threat or Use of Nuclear Weapons* (note 83 above), para. 83.

(b) It must be accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.

Draft conclusion 5
***Jus cogens* norms as norms of general international law**

1. A norm of general international law is one which has a general scope of application.

2. Customary international law is the most common basis for the formation of *jus cogens* norms of international law.

3. General principles of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice can also serve as the basis for *jus cogens* norms of international law.

4. A treaty rule may reflect a norm of general international law capable of rising to the level of a *jus cogens* norm of general international law.

Draft conclusion 6
Acceptance and recognition as a criterion for the identification of *jus cogens*

1. A norm of general international law is identified as a *jus cogens* norm when it is accepted and recognized as a norm from which no derogation is permitted.

2. The requirement that a norm be accepted and recognized as one from which no derogation is permitted requires an assessment of the opinion of the international community of States as a whole.

Draft conclusion 7
International community of States as a whole

1. It is the acceptance and recognition of the community of States as a whole that is relevant in the identification of norms of *jus cogens*. Consequently, it is the attitude of States that is relevant.

2. While the attitudes of actors other than States may be relevant in assessing the acceptance and recognition of the international community of States as a whole, these cannot, in and of themselves, constitute acceptance and recognition by the international community of States as a whole. The attitudes of other actors may be relevant in providing context and assessing the attitudes of States.

3. Acceptance and recognition by a large majority of States is sufficient for the identification of a norm as a norm of *jus cogens*. Acceptance and recognition by all States is not required.

Draft conclusion 8
Acceptance and recognition

1. The requirement for acceptance and recognition as a criterion for *jus cogens* is distinct from acceptance as law for the purposes of identification of customary international law. It is similarly distinct from the requirement of recognition for the purposes of general principles of law within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice.

2. The requirement for acceptance and recognition as a criterion for *jus cogens* means that evidence should be provided that, in addition to being accepted as law, the norm in question is accepted by States as one which cannot be derogated from.

Draft conclusion 9
Evidence of acceptance and recognition

1. Evidence of acceptance and recognition that a norm of general international law is a norm of *jus cogens* can be reflected in a variety of materials and can take various forms.

2. The following materials may provide evidence of acceptance and recognition that a norm of general international law has risen to the level of *jus cogens*: treaties, resolutions adopted by international organizations, public statements on behalf of States, official publications, governmental legal opinions, diplomatic correspondence and decisions of national courts.

3. Judgments and decisions of international courts and tribunals may also serve as evidence of acceptance and recognition for the purposes of identifying a norm as a *jus cogens* norm of international law.

4. Other materials, such as the work of the International Law Commission, the work of expert bodies and scholarly writings, may provide a secondary means of identifying norms of international law from which no derogation is permitted. Such materials may also assist in assessing the weight of the primary materials.

V. Future work programme

92. The present report has focused on the criteria for the identification of a norm of *jus cogens*. The first report of the Special Rapporteur focused on the nature and historical evolution of *jus cogens*. In the first report, the Special Rapporteur also provided a road map for 2017, 2018 and 2019. While it was stated that the road map would be approached with flexibility, the Special Rapporteur does not, at this stage, see a need to deviate from it.

93. In the next report, in 2018, the Special Rapporteur intends to begin consideration of the effects or consequences of *jus cogens*. The report will address, inter alia, the consequences of *jus cogens* in general terms. The report will also consider effects of *jus cogens* in treaty law and other areas of international law, such as the law of State responsibility and the rules on jurisdiction. With respect to the effects of *jus cogens*, the Special Rapporteur would appreciate comments from the Commission on other areas of international law that could benefit from study. The fourth report of the Special Rapporteur will address miscellaneous issues arising from the debates within the Commission and the Sixth Committee.

94. The Special Rapporteur will also consider, on the basis of the debates within the Commission and the Sixth Committee, whether, on what basis and in what form to propose an illustrative list of *jus cogens* norms. The Special Rapporteur will provide proposals on this question in the fourth report.